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THE RIGHT TO VOTE AND ITS IMPLEMENTATION

*Donald P. Kommers**

The quest for political equality has been a major theme of American history. Indeed, since 1789, the American political system has undergone steady progress toward increasing democratization.¹ Slavery was abolished in 1865. The right to vote is no longer limited by restrictions based on property, race, color, or sex. Since 1913 United States senators have been elected by the people. Political equality is afforded to the citizens of each state through the equal protection and due process clauses of the fourteenth amendment. And the operation of the electoral college, originally intended to house a political elite, has been so modified by the American party system as to render the presidency the most democratic political institution in the land. Indeed, presidential politics has brought us as close to majority rule as we can ever expect to get in an imperfect political world.

All this is the progeny of the philosophy of the Declaration of Independence, for the idea of equality is implicit in the American political consensus. Yet, as far as this nation has progressed in building an equalitarian society and approximating majority rule, the idea has not been fully translated into reality. For today thousands of American Negroes are being deprived of the right to vote with the result that they are cut off from any meaningful participation in the life of our society. The moral and social costs that this nation has paid as a result of the Negro's disfranchisement are inestimable. As the Civil Rights Commission noted: "There exists here a striking gap between our principles and our everyday practices. This is a moral gap. It spills over into and vitiates other

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¹ See generally PORTER, *A HISTORY OF SUFFRAGE IN THE UNITED STATES* (1918); GOSNELL, *DEMOCRACY: THE THRESHOLD OF FREEDOM* (1948); MCGOVNEY, *THE AMERICAN SUFFRAGE MEDLEY* (1949); WILLIAMSON, *AMERICAN SUFFRAGE: FROM PROPERTY TO DEMOCRACY 1760-1860* (1960). See also the bibliography in Note, 1 EMERSON AND HABER, *POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES* 141 (1958).

areas of our society. It runs counter to our traditional concepts of fair play. It is a partial repudiation of our faith in the democratic system. It undermines the moral suasion of our national stand in international affairs. It reduces the productivity of our Nation."²

The right to vote in a democracy is important because so many other matters depend upon its exercise. Mr. Justice Black put the point cogently in *Wesberry v. Sanders*:³ "No right," he said, "is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined." Democracy is meaningless unless each man is afforded access to social, cultural, intellectual, and economic opportunity. Such opportunities, as Justice Black intimates, often depend upon one's integration into the political community. In the case of the American Negro, denial of his right to vote has, more often than not, deprived him of his manhood, his integrity, and his sense of decency.

A society which is truly free and truly open admits all of its citizens into its arena of decision-making. Within that framework public policy is determined by a majority of those who decide to participate in the deliberative process, which includes the election of public officials. In politics, as in everything else, some people lose while others win and few are ever completely satisfied with the results of political contests. But Americans are conditioned to accept these results because they are arrived at *democratically*, just as they are conditioned to expect the peaceful, if not graceful, transfer of power from one party to another in the aftermath of an election — a clear sign always of a politically mature people and a stable polity. Democracy, therefore, is a way of making decisions. We believe in it because it is the best way that wretched and fallible creatures like ourselves can get along without oppressing one another. According to our theory of democracy, every qualified citizen is entitled to vote for those who represent him in the policy-making process. As long as the decision-making machinery is not tampered with so as to prevent the losers from opposing the policy-makers in subsequent elections, or to bar them from employing legitimate means of political influence, or to deprive them of the capacity to reassemble their political forces in the hope of later attaining victory, the institutional integrity of the democratic system is preserved.

We are suggesting that actual participation, or at least the right to participate, in a system of democratic decision-making is of paramount importance, because a group's non-participation in the political process, particularly when enforced, may lead to its estrangement or alienation from the body politic. The danger is that such groups, isolated from the variety, heterogeneity, and dynamic fluctuations of the total society, are notably susceptible to extremist appeals and other forms of demagoguery.⁴ Indeed, if citizens are not allowed to participate in electoral processes or are made to feel that they do not belong, they cannot be

² 1959 REPORT OF THE UNITED STATES COMMISSION ON CIVIL RIGHTS 135. [Hereinafter cited as 1959 CIVIL RIGHTS REPORT.]

³ 84 Sup. Ct. 526, 535 (1964).

⁴ For a general discussion of this phenomenon see LIPSET, *POLITICAL MAN: THE SOCIAL BASES OF POLITICS* 77-96 (1960).

expected to develop any genuine loyalty to the political system under which they live and, after a time, may even begin to question the legitimacy of the system itself. It seems that the Negro's alienation has already found expression in the Black Muslim movement, which differs from the protest movements of the past in that the Muslims have lost their faith in the ability of American democracy to achieve justice for all. It is this revolutionary potential among disaffected and disfranchised Negroes that makes it particularly urgent now to redress the grievances which have relegated the Negro to second-class citizenship. The cleavage between Negroes and white Americans will intensify if qualified Negro citizens continue to be denied the opportunity to vote. By extending the franchise to all citizens without regard to race or color all groups will eventually be absorbed into the American consensus, for we would agree with sociologist Seymour Lipset that "voting is the key mechanism of consensus in democratic society."⁵

This article will review past and present efforts of the federal government to implement the right to vote in the United States and will place particular emphasis upon the recent work of the Civil Rights Commission and the Civil Rights Division of the Justice Department to secure voting rights for the Negro. Also treated at some length are the political and constitutional problems involved in implementing the right to vote. Our analysis will take us through the voting provisions of the Civil Rights Bill of 1964, pending before Congress as this is written.

I. HISTORICAL BACKGROUND

No less than eight federal constitutional provisions deal with elections and voting rights. Article I, section 2 provides that electors of the most popular branch of state legislatures shall be entitled to elect United States representatives. The seventeenth amendment, providing for the popular election of United States senators, also makes voter eligibility depend upon qualifications the state prescribes for electors of its most numerous legislative branch while article II, section 1 similarly leaves to the states responsibility for determining the manner in which presidential electors are to be designated. Congressional power over national elections derives mainly from article I, section 4, which gives Congress the power to alter state regulations pertaining to the times, places, and manner of holding elections for senators and congressmen.⁶

The four remaining provisions limit the states' power over the elective franchise. Though the first section of the fourteenth amendment makes no specific reference to elections, it obviously means that state election laws governing both state and national elections must be fairly and equally administered.⁷ The fifteenth amendment prohibits racial discrimination in the exercise of the franchise by declaring, "The right of citizens of the United States to vote shall not

5 *Id.* at 30.

6 Article I, Section 5 also gives to each house of the national legislature the right to judge the election of its members. Thus, either house has jurisdiction to inquire into the legality of such an election and to settle contested elections. Under Article II Congress also determines the time of choosing presidential electors.

7 Section 2 of the Fourteenth Amendment provides for the reduction of a state's Congressional representation proportionate to the number of citizens denied the right to vote, but Congress has not yet invoked the provision.

be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." The nineteenth amendment extended freedom of the suffrage to women, barring any abridgement of the right to vote on account of sex. Finally, the twenty-fourth amendment, ratified January 23, 1964,⁸ forbids the imposition of a poll tax as a condition for voting in national elections.⁹

Congressional debate over civil rights bills often centers on whether Congress has the power to control voter qualifications under section 4 of article I. The provision is susceptible to varying interpretation. It might be construed to sanction congressional legislation *only if* a state in the first instance fails to regulate the times, places, and manner of holding elections for senators and representatives.¹⁰ On the other hand, the term "manner" might be broadly construed to permit federal surveillance over *any* aspect of congressional elections, including voter qualifications, regardless of whether a state has enacted prior regulations, for the Constitution states that Congress may *at any time* alter such regulations.

Section 4 of article I, however, must be considered together with section 2 of article I and the seventeenth amendment, both of which seem to give the states power to define the qualifications of electors where federal elections are concerned. The Convention's decision to leave this power to the states reflected not essentially the framers' conviction that the matter *ought* to be a reserved right of the states, but simply a pragmatic adjustment to a difficult situation deriving from the great variation in voter qualification laws among the original thirteen states and the consequent inability of the Convention to agree on any uniform standard of voter eligibility.¹¹

The federal system further complicates the matter of congressional power over elections in view of the fact that we possess dual citizenship, for the privileges and immunities of the United States are not coextensive with those of the states.¹² Though the right to vote for senators and representatives is secured by the federal constitution,¹³ freedom of suffrage is not a privilege of United States citizenship.¹⁴ That privilege depends upon state voter qualifications;¹⁵ once these have been determined the federal constitutional right to vote automatically follows, and Congress may then employ the means at its disposal to guarantee the un-

8 N.Y. Times, Jan. 24, 1964, p. 1, col. 6.

9 The most recent amendment to the U.S. Constitution declares that "The right of citizens of the United States to vote in any primary or other election for President or Vice-President, for electors for President or Vice-President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any state by reason of failure to pay any poll tax or other tax." U.S. CONST. amend. XXIV.

10 This was the point of view urged by several legislators when the proposal to elect Senators on a popular basis was being argued. See 47 CONG. REC. 1925 (1911) and 48 CONG. REC. 6367 (1912).

11 ELLIOT, 5 DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION 385-386 (1863). See also THE FEDERALIST NO. 52 (Hamilton or Madison).

12 Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873).

13 Ex parte Yarbrough, 110 U.S. 651 (1884); Wiley v. Sinkler, 179 U.S. 58 (1900); Swafford v. Templeton, 185 U.S. 487 (1902); United States v. Classic, 313 U.S. 299 (1941).

14 Minor v. Happersett, 88 U.S. (21 Wall.) 162 (1875); United States v. Reese, 92 U.S. 214 (1875); United States v. Cruikshank, 92 U.S. 542 (1875); Pope v. Williams, 193 U.S. 621 (1904). In Walker v. United States, 93 F.2d 383 (8th Cir. 1937), the court of appeals held that the right to vote for presidential electors depended "exclusively upon state legislation."

15 The Supreme Court has ruled that the right to vote is not even inherent in state citizenship. Minor v. Happersett, 88 U.S. (21 Wall.) 162 (1875).

impeded and unadulterated exercise of that right.¹⁶ But under section 4 of article I, congressional power over the electoral process seems to stop where the election of federal officials ends. Accordingly, in *United States v. Reese*,¹⁷ the Supreme Court held invalid provisions of an 1870 statute which were applied to enforce the right of a Negro citizen to vote in a state election. There the Court indicated that while the fifteenth amendment conferred a constitutional right to be exempt "from discrimination in the exercise of the elective franchise on account of race, color, or previous condition of servitude," it did not confer any right of suffrage itself.¹⁸

The Enforcement Act of 1870, enacted during Reconstruction, was the first major piece of federal legislation providing machinery for supervising elections in the states. According to its provisions, any violation of state laws governing the election of national officers, or any interference, private or official, with a citizen's right to vote, or any fraudulent act or conduct in registering eligible voters, in counting ballots, or in assessing the results of an election, was made a federal crime.¹⁹ Though the constitutionality of the 1870 act was upheld by the Supreme Court as applied to federal elections,²⁰ Congress repealed in 1894 most of the provisions dealing with the direct federal supervision of elections in the states,²¹ reflecting, it would appear, a congressional preference for placing the conduct of elections back into the exclusive hands of state authorities. Left standing, however, were two general civil rights provisions providing criminal sanctions against conspiracies to deprive any citizen of any right secured by the Constitution and laws of the United States,²² and against the deprivation of constitutional rights, privileges, and immunities under color of state law.²³ A

16 *United States v. Classic*, 313 U.S. 299 (1941); *United States v. Saylor*, 322 U.S. 385 (1944); *United States v. Mosley*, 238 U.S. 383 (1915). In the *Yarborough* case the Court said:

The States in prescribing the qualifications of voters for the most numerous branch of their own legislatures, do not do this with reference to the election of members of Congress. Nor can they prescribe the qualification for voters for those *eo nomine*. They define who are to vote for the popular branch of their own legislature, and the Constitution of the United States says the same persons shall vote for members of Congress in that State. It adopts the qualifications thus furnished as the qualification of its own electors for members of Congress.

It is not true, therefore, that electors for members of Congress owe their right to vote to the State law in any sense which makes the exercise of the right to depend exclusively on the Law of the State. *Ex parte Yarborough*, 110 U.S. 651, 663-64 (1884).

17 92 U.S. 214 (1875).

18 *Id.*, at 218.

19 16 Stat. 140 (1870). See also 16 Stat. 254 (1870) and 17 Stat. 347-49 (1872).

20 *Ex parte Siebold*, 100 U.S. 371 (1880); *Ex parte Clarke*, 100 U.S. 399 (1880); *United States v. Gale*, 109 U.S. 65 (1883); *In re Coy*, 127 U.S. 731 (1888).

21 28 Stat. 36 (1894).

22 The provision now reads:

If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; or

If two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured —

They shall be fined not more than \$5,000 or imprisoned not more than ten years, or both. 62 Stat. 696 (1948), 18 U.S.C. § 241 (1958).

23 This provision now reads:

Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any inhabitant of any State, Territory, or District

third provision which survived the 1894 repealer was the simple guarantee that all citizens of the United States qualified to vote by law shall be entitled to do so without regard to race, color, or previous condition of servitude.²⁴ Simply declaratory of the constitutional right based upon the fifteenth amendment, this section imposes no punishment for its violation;²⁵ it is usually invoked along with some other relevant federal law which does afford a remedy. It is also possible for a private citizen to invoke an old 1871 statute²⁶ for civil damages in the event that persons acting under state law or custom deprive him of rights secured by federal laws or the Constitution.²⁷

As noted, all three of these general civil rights statutes insure rights secured by the Constitution and federal laws. But their implementation has caused some difficulty. Again we would note that the right to vote generally depends upon state law, for federal control over national elections obtains only after a state has declared, by its voter eligibility laws, who is entitled to vote. But suppose the federal government has not chosen specifically to regulate the conduct of elections for federal officers, as Congress has not done except for a brief period of twenty-four years when the Enforcement Act was on the books. May state abridgment of the right to vote in that circumstance be redressed under the criminal sanctions of 18 U.S.C. §§ 241-42? This was the issue presented in *United States v. Mosley*.²⁸ There the Court extended the coverage of the conspiracy statute to protection of the right to vote for members of Congress. But in *United States v. Bathgate*²⁹ the Court held that a conspiracy to bribe voters in federal elections was not covered by the statute in view of "the policy of Congress not to interfere with elections within a State *except by clear and specific*

to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined not more than \$1,000 or imprisoned not more than one year, or both. 62 Stat. 696 (1948), 18 U.S.C. § 242 (1958).

24 It states:

All citizens of the United States who are otherwise qualified by law to vote at any election by the people in any State, Territory, district, county, city, parish, township, school district, municipality or other territorial subdivision, shall be entitled and allowed to vote at all such elections, without distinction of race, color, or previous condition of servitude; any constitution, law, custom, usage, or regulation of any State or Territory, or by or under its authority, to the contrary notwithstanding. 16 Stat. 140 (1870), 42 U.S.C. § 1971(a) (1958). The Constitutionality of this provision was upheld in two early lower court decisions. In *re Engel*, 8 Fed. Cas. 716 (No. 4, 488) (C.C.D. Md. 1877); *Kellogg v. Warmouth*, 14 Fed. Cas. 257 (No. 7,667) (C.C.D. La. 1872). See also *Karem v. United States*, 121 F. 250 (6th Cir. 1903), and *Chapman v. King*, 154 F.2d 460 (5th Cir. 1946), *cert. denied*, 327 U.S. 800 (1946).

25 *United States v. Reese*, 92 U.S. 214, 216 (1875).

26 17 Stat. 13 (1871), 42 U.S.C. § 1983 (1958).

27 It states that "every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." 17 Stat. 13 (1871), 42 U.S.C. § 1983 (1958).

28 238 U.S. 383 (1915).

29 246 U.S. 220, 226 (1918) (emphasis added). The Court seemed on sounder ground when it refused to apply the conspiracy statute to primary elections which Congress up to this time had never sought to control. See *United States v. O'Toole*, 243 U.S. 476, 486-89 (1917). But

provisions." Failing to read such a clear and indisputable intent into legislative history the Supreme Court, without overruling *Bathgate*, returned to the spirit of *United States v. Mosley* when it held, Mr. Justice Douglas dissenting, that a conspiracy by election officials to stuff a ballot box in an election for a United States senator was an offense punishable by 18 U.S.C. § 241, which includes both the right to cast a ballot and to have it counted.³⁰ Since *United States v. Saylor*, section 241 has been invoked frequently to punish federal election frauds.³¹ It has been used less often to prosecute interferences with the right to vote growing out of intimidation or violence.

Another problem arises from the fact that under the fifteenth amendment, the right to vote is protected against governmental, not private discriminatory action, and then only action which is discriminatory on account of race or color.³² This has raised the question whether 18 U.S.C. § 241, since directed against conspiracies by "two or more persons," is appropriate legislation under the amendment. That discriminatory state action was not alleged in a conspiracy of private persons to deprive certain Negroes of various civil rights constituted one reason the Supreme Court found the federal government's charges defective in *United States v. Cruikshank*.³³ In *United States v. Harris*,³⁴ the Court actually struck down a similarly worded conspiracy statute on the ground that the fourteenth amendment does not forbid private conspiracies to deprive persons of the equal protection of the laws. On the other hand, 18 U.S.C. § 242, enacted to implement both fourteenth and fifteenth amendments, specifically prohibits deprivations of constitutional rights under color of state law; but it is broader than 18 U.S.C. § 241 since it affects any person, not only conspiracies, which must involve two or more persons, acting under law. And since the fourteenth amendment is involved, it is not confined to discrimination based on race or color. However, the provision has seldom been used to protect the right to vote.³⁵ The

any lingering hope that Congress might be able to regulate primary elections to select candidates for federal office was dashed in *Newberry v. United States*, 256 U.S. 232 (1921) where the Court held that primaries were not elections within the meaning of Article I, Section 4; thus, the Federal Corrupt Practices Act was unconstitutional as applied to a candidate for the United States Senate running in a primary election. *But see United States v. Classic*, 313 U.S. 299 (1941).

30 *United States v. Saylor*, 322 U.S. 385 (1944).

31 See, e.g., *Walker v. United States*, 93 F.2d 383 (8th Cir. 1937), *cert. denied*, 303 U.S. 644 (1938); *Ledford v. United States*, 155 F.2d 574 (6th Cir. 1946), *cert. denied*, 329 U.S. 733 (1946); *Klein v. United States*, 176 F.2d 184 (8th Cir. 1949), *cert. denied*, 338 U.S. 870 (1949); *Prichard v. United States*, 181 F.2d 326 (6th Cir. 1950), *aff'd*, 339 U.S. 974 (1950); *Crolich v. United States*, 196 F.2d 879 (5th Cir. 1952), *cert. denied*, 344 U.S. 830 (1952); *Fields v. United States*, 228 F.2d 544 (4th Cir. 1955), *cert. denied*, 350 U.S. 982 (1956); *United States v. Nathan*, 238 F.2d 401 (7th Cir. 1957), *cert. denied*, 353 U.S. 910 (1957).

32 *James v. Bowman*, 190 U.S. 127 (1903). There the Supreme Court struck down a provision of the Enforcement Act of 1870 since it was intended to prevent private parties as well as state officials from interfering with the right of suffrage. Not only did the indictment fail to allege that Negro voters were bribed by state officials, but also failed to allege that the Negroes in question were bribed because of their race.

33 92 U.S. 542, 554 (1875).

34 106 U.S. 629 (1882).

35 Prior to *United States v. Classic*, 313 U.S. 299 (1941), this provision was used only once with respect to elections. In *United States v. Stone*, 188 Fed. 836 (D. Md. 1911), Maryland election officials were convicted for conspiring to deny Negroes the right to vote at a congressional election. The *Classic* case pointed out that two offenses are actually created by the provision. The first is willfully subjecting any person to the deprivation of rights secured by the Constitution; the second is willfully subjecting any person to different punishments on account of his alienage, color or race, than prescribed for the punishment of other citizens. *United States v. Classic*, *supra*, at 327.

lack of any machinery in the Justice Department prior to 1939 to enforce the right to vote may be one reason why these criminal sanctions have not often been invoked or effectively applied in the voting field.

Nor has the civil damage suit or the equitable proceeding, allowed under 42 U.S.C. § 1983, been an effective legal sanction for implementing the right to vote. A civil damage suit is an unrealistic remedy as seems evidenced from the paucity of such cases against the backdrop of widespread discrimination. The same is true of equitable relief. In both instances the initiative must come from the aggrieved citizen who, for various reasons, may be reluctant to get himself involved in the web of litigation, if indeed he is even aware of his rights under law. Justice Holmes once pointed out the utter futility of disposing of such controversies in the judicial forum. He said:

Unless we are prepared to supervise . . . voting in [the state] by officers of the court, it seems to us that all the plaintiff could get from equity would be an empty form. Apart from damages to the individual, relief from a great political wrong, if done, as alleged, by the people of a State and the State itself, must be given by them or by the legislative and political department of the government of the United States.³⁶

Moreover, the Supreme Court has applied these broad civil rights provisions with considerable restraint. The traditional conservative approach to the Court's construction of these provisions was indicated by the remark of Mr. Justice Jackson in *Collins v. Hardyman*³⁷ where he said they were "not to be used to centralize power so as to upset the federal system."

A good deal of tension obviously exists between the right of a state to control elections and the right of the citizen to cast a ballot. But the extent of state power over elections has been more sharply defined than Justice Jackson's comment might lead us to believe. Let us briefly review the landmark decisions of the Supreme Court which appear to set forth the boundaries of state power in this sensitive area of federal-state relations.

It should be recalled at the outset that though the right to vote in federal elections, at least, is secured by the Constitution,³⁸ the Court has upheld reasonable state regulations over the exercise of that right. Thus it is permissible for a state to write voter qualification laws which will insure the integrity and elevate the quality of popular participation in the electoral process. But such laws must apply equally to all citizens. Our theory of government may not imply universal suffrage in the absolute sense, but it does imply absolute equality in the exercise of the franchise, once granted. It bars, for example, unreasonable classifications like those which were at issue in *Guinn v. United States*.³⁹ There the famous "grandfather clause" of the Oklahoma Constitution was struck down since it provided that no person could be registered unless able to read and write any section of the state constitution, except that those whose ancestors were eligible to vote prior to January 1, 1866, were exempted from the literacy requirement, an obvious subterfuge to disfranchise the Negro. Somewhat more

³⁶ *Giles v. Harris*, 189 U.S. 475, 488 (1903).

³⁷ 341 U.S. 651, 658 (1951).

³⁸ *Ex parte Yarbrough*, 110 U.S. 651 (1884). See *supra* note 13.

³⁹ 238 U.S. 347 (1915). See also *Myers v. Anderson*, 238 U.S. 368 (1915).

subtle but no less invidious was a subsequent Oklahoma registration law which made eligible voters out of all Oklahomans who had voted in the 1914 election — which, incidentally, was conducted in accordance with the old “grandfather clause”—but those persons who did not vote at that time were required to register to vote, if qualified, between April 30, 1916, and May 11, 1916.⁴⁰ A Negro, though qualified to register and vote in 1916, failed to do so. Many years later, in 1934, when he finally decided to register, he was denied a registration certificate for his failure to register within the time specified eighteen years earlier. The statute worked to disfranchise him permanently. Recognizing the Oklahoma statute for what it was the Supreme Court declared:

[T]he reach of the Fifteenth Amendment against contrivances by a state to thwart equality in the enjoyment of the right to vote by citizens of the United States regardless of race or color, has been amply expounded. . . . The Amendment nullifies sophisticated as well as simple-minded modes of discrimination. It hits onerous procedural requirements which effectively handicap exercise of the franchise by the colored race although the abstract right to vote may remain unrestricted as to race.⁴¹

For a long time the white primary, as it developed in the South, was a favorite device for disfranchising the Negro. The significance of the primary election as it relates to non-voting among southern Negroes will be discussed below. But for the moment suffice it to say that the white primary insured the hegemony of the Democratic Party in the South and with that the political impotence of the Negro. The constitutional theory which appeared to have legitimized the southern practice of excluding Negroes from participation in Democratic Party primaries was that a political party, being a private association, could escape the proscriptions of the fourteenth and fifteenth amendments which barred only *state* discriminatory action. Thus a political party, acting independently of the state, might pass resolutions forbidding Negroes from taking part in any intra-party deliberations or contests with constitutional impunity. The Supreme Court breathed life into this theory in *Grovey v. Townsend*⁴² where the Court declined to identify the state with the discriminatory practices of the Texas Democratic Party, even though state law governed many aspects of primary elections. In an incredibly myopic view of the situation the Court simply failed to appreciate the intrinsic relationship between the privilege of party membership, upon which participation in the primary election depended, and the right to vote in the general election.⁴³ But *Grovey* has to be considered along with

40 Okla. Laws 1916, ch. 24, § 4, at 34.

41 Lane v. Wilson, 307 U.S. 268, 275 (1939).

42 295 U.S. 45 (1935).

43 *Id.* at 55. Prior to *Grovey* the Court held unconstitutional a Texas statute which expressly barred Negroes from participating in a democratic party primary election as a “direct and obvious infringement” of the fourteenth amendment. *Nixon v. Herndon*, 273 U.S. 536, 541 (1927). Five years later in an opinion by Mr. Justice Cardozo, the Court also struck down a Texas law which delegated to the State Executive Committee of the Texas Democratic Party the power to prescribe the requisites of party membership, pursuant to which the Committee promulgated a rule excluding Negroes from party membership and *a fortiori*, from participation in primary elections. Since the power to establish the policy of Negro exclusion was derived from state law the Court regarded it as state action in contravention of the fourteenth amendment. *Nixon v. Condon*, 286 U.S. 73 (1932). The question whether a political party has unrestrained power to define its membership in the absence of any state law governing its organization and conduct was reserved for *Grovey v. Townsend*, *supra* note 42.

*Newberry v. United States*⁴⁴ which held that congressional power over elections does not extend to primaries since the primary is not an election within the meaning of the Constitution, but simply a device, like the party caucus or convention, for selecting nominees to run in the general election.

The tide began to turn in 1941 with *United States v. Classic*.⁴⁵ Though not involving any question of racial discrimination, that case had to do with a prosecution under sections 19 and 20 of the Criminal Code (now 18 U.S.C. §§ 241 and 242) against persons accused of willfully altering and falsifying ballots cast by voters in a Louisiana primary election. The question as to whether the constitutional right to vote for members of Congress had been infringed in violation of the Criminal Code depended again on whether a primary election was in fact an election within the meaning of article 1, section 4. In refusing to read the term "election" with "stultifying narrowness,"⁴⁶ the Court held that primaries do constitute elections in which citizens have the right to participate for the purpose of choosing their representatives in Congress, provided that "the primary is by [state] law made an integral part of the election machinery" or "where in fact the primary effectively controls the choice" of candidates.⁴⁷

Here the Court set down two tests for determining whether primaries are elections within the meaning of the Constitution. The first depends on whether the primary is *integral* to the election as a matter of state law; the second, on whether the primary *in fact* governs the election outcome. Both tests were eventually applied to bar political parties from discriminating in primaries on account of race. After *Nixon v. Condon*⁴⁸ a state convention of the Texas Democratic Party passed a resolution excluding Negroes from its primaries. The exclusion was presumably based on an action of a voluntary association and hence outside constitutional proscriptions.⁴⁹ But in *Smith v. Allwright*⁵⁰ the Court observed that the primary election, though run by party officials, was conducted under state law and, therefore, constituted an integral part of the election process. The exclusion policy of the Texas Democratic Party was accordingly held to violate the fifteenth amendment. "[W]hen, as here," said the Court, "that privilege [party membership] is also the essential qualification for

44 256 U.S. 232 (1921).

45 313 U.S. 299 (1941).

46 *Id.* at 320.

47 *Id.* at 318. Said Mr. Justice Stone: "Unless the constitutional protection of the integrity of 'elections' extends to primary elections, Congress is left powerless to effect the constitutional purpose, and the popular choice of representatives is stripped of its constitutional protection save only as Congress, by taking over the control of state elections, may exclude from them the influence of the state primaries." *Id.* at 319.

48 286 U.S. 73 (1932).

49 In *Bell v. Hill*, 123 Tex. 531, 74 S.W.2d 113 (1934), the Supreme Court of Texas ruled that the Texas Democratic Party was a "voluntary association." The Court stated that "since the right to organize and maintain a political party is one guaranteed by the Bill of Rights of this state, it necessarily follows that every privilege essential or reasonably appropriate to the exercise of that right is likewise guaranteed, including, of course, the privilege of determining the policies of the party and its membership. Without the privilege of determining the power of a political association and its membership, the right to organize such an association would be a mere mockery." *Id.* at 120.

50 321 U.S. 649 (1944). See also *Perry v. Cyphers*, 186 F.2d 608 (5th Cir. 1951).

voting in a primary to select nominees for a general election, the State makes the action of the party the action of the State."⁵¹

The second test was applied in *Terry v. Adams*.⁵² The Democratic Party had established private clubs — known as Jaybird Associations — in several Texas counties to hold pre-primary elections. Composed of all eligible white voters in the county and wholly unregulated by law, these associations would proceed to select candidates to run in the primary and in this way control the final outcome of the general election. In rejecting the contention that these associations were exclusively private clubs the Supreme Court, in following two lower federal court decisions,⁵³ held that the state had in effect abdicated its rightful authority over the electoral process to these local associations. Since the elections conducted by these associations ultimately determined who shall govern, Negroes lost "every vestige of influence in selecting the officials who control the local county matters that intimately touch the daily lives of citizens."⁵⁴ The Court was emphatic in its rejection of the pre-primary device: "For a state to permit such a duplication of its election is to permit a flagrant abuse of those processes to defeat the purposes of the fifteenth amendment."⁵⁵ It appears that the southern imagination would be hard put to come up with any other plan that might successfully circumvent these decisions; the white primary has been relegated to the less illustrious annals of our history.

Although these cases gave us an important body of law on the constitutional right to vote, they did not generate any significant increase in the incidence of voting among Negroes in the South. Despite the fact that the gap between our political ideals and the bitter reality of discrimination was wide enough for all to see, there seemed not much official concern or popular desire to close the ethical gap in our national life until a century of quasi-oppression exploded into the great American Negro revolution of the late 1950's that is still with us today. But even before the emergent political activism of the modern Negro the groundwork for new federal initiatives in the civil rights field, after decades of official inertia, was slowly being laid.

In 1939 Attorney General Frank Murphy established a Civil Rights Sec-

51 321 U.S. 649, 664-65 (1944).

52 345 U.S. 461 (1953).

53 *Elmore v. Rice*, 72 F. Supp. 516 (E.D. S.C. 1947), *aff'd* 165 F.2d 387 (4th Cir. 1947), *cert. denied*, 333 U.S. 875 (1948). There South Carolina had repealed all its laws pertaining to primary elections after which the Democratic Party proceeded to hold the primary while excluding Negroes from voting therein. After the Party was enjoined from continuing its discriminatory exclusion of Negroes the control of primaries was placed in the hands of local clubs which also excluded Negroes. In holding this scheme unconstitutional the Court of Appeals stated:

The argument is made that a political party does not exercise state power but is a mere voluntary organization of citizens to which the constitutional limitations upon the powers of the state have no application. This may be true of a political party which does not undertake the performance of state functions, but not of one which is allowed by the state to take over and operate a vital part of its electoral machinery. When the organization of the party and the primary which it conducts are so used in connection with the general election that the latter merely registers and gives effect to the discrimination which they have sanctioned, such discrimination must be enjoined to safeguard the election itself from giving effect to that which the Constitution forbids. *Baskin v. Brown*, 174 F.2d 391, 394 (4th Cir. 1949).

54 *Terry v. Adams*, 345 U.S. 461, 470 (1953).

55 *Id.* at 469.

tion in the Criminal Division of the Justice Department.⁵⁶ It appears that hundreds of complaints involving election irregularities were brought to the attention of the Civil Rights Section, but most of these were dismissed after investigation and only a very few cases involved racial discrimination.⁵⁷ Perhaps the most important result of the Section's work was the realization that current civil rights statutes were inadequate to redress many wrongs in the civil rights field. The government could not bring civil suits and was reluctant to invoke available criminal sanctions.⁵⁸ Indeed, very few criminal prosecutions were brought by the Civil Rights Section. Carr summed the matter up by saying that the Section's activity represented "a commendable program hamstrung by lack of authority and an inadequate organization."⁵⁹ It seemed obvious that an effective program of federal protection of civil rights would have to depend on further congressional legislation.⁶⁰

The report of President Truman's Committee on Civil Rights set in motion a chain of events which culminated, a full decade later, in the first major civil rights statute since 1875. The Committee reported that "the denial of the suffrage on account of race is the most serious present interference with the right to vote."⁶¹ Literacy tests, poll taxes, as well as terror and intimidation, constituted the principal methods of disfranchising Negroes.⁶² To shore up the citizen's right to vote, the Committee recommended federal action to

56 1939 ATT'Y GEN. ANN. REP. 2. For an excellent study of the work, successes, and frustrations of the Civil Rights Section see CARR, *FEDERAL PROTECTION OF CIVIL RIGHTS* (1947).

57 See, for example, 1955 ATT'Y GEN. ANN. REP. 130-32. See also REPORT OF THE PRESIDENT'S COMMITTEE ON CIVIL RIGHTS, *To Secure These Rights* 120 (1947). [Hereinafter cited as PRESIDENT'S COMMITTEE REP.].

58 In this connection Carr reported:

The number of criminal prosecutions the CRS has been responsible for, since its creation in 1939, is phenomenally low. This low number is due to the inadequacy of the national police force whose responsibility it is to discover civil liberty offenses. It is also due to the deterring knowledge that it is exceedingly hard to obtain convictions in criminal cases of this type. Here we have criminal sanctions operating in exactly the way they are intended to operate, *i.e.*, providing a means by which society can be ordered, and recalcitrant individuals forced into line through warning and negotiation, without the necessity of imposing extreme penalties of law in every instance. CARR, *op. cit.*, *supra* note 56, at 198.

And in 1956, the year before the creation of a separate division of civil rights in the Justice Department the Attorney General reported: "Events may make more urgent the need for passage of such legislation [the Eisenhower Administration's civil rights bill], but whether the need increases or decreases, the Department of Justice should have the more flexible civil powers provided by the Bill and should not be restricted to the use of the cumbersome and often harsh criminal proceedings under the two criminal statutes, 18 U.S.C. § 241 and § 242." 1956 ATT'Y GEN. ANN. REP. 122. See also the evaluation of the Civil Rights Section by President Truman's special committee on civil rights. PRESIDENT'S COMMITTEE REP.

59 CARR, *op. cit.* *supra* note 56, at 203.

60 Speaking before a Senate Subcommittee looking into proposed civil rights legislation in 1949 Thurgood Marshall, then special counsel for the NAACP, said:

During the period this Division [Civil Rights Section] has been in existence and especially during the administration of Attorney General Tom Clark, the main reasons more progress has not been made are (1) the inadequacies of the existing civil-rights statutes; (2) the lack of full departmental status under an Assistant Attorney General; (3) lack of a sufficient number of agents for the Federal Bureau of Investigation; and, finally, the lack of sufficient funds to operate. *Hearings on S. 1725 and S. 1734 Before a Subcommittee on the House Committee on the Judiciary*, 81st Cong., 1st Sess. 31 (1949).

61 PRESIDENT'S COMMITTEE REP. 35.

62 *Id.* at 37-40.

(1) abolish the poll tax in state and federal elections, (2) protect the right of qualified persons to participate in federal elections against interference by public officials and private persons, and (3) insure that state registration and election laws are administered impartially and without regard to race or color.⁶³ To accomplish these objectives and to strengthen the machinery for the protection of civil rights generally the Committee also recommended (1) the creation of a Civil Rights Division within the Justice Department, (2) the establishment by statute of a permanent Commission on Civil Rights in the Executive Office of the President, and (3) a Joint Standing Committee on Civil Rights in Congress.⁶⁴ These and other civil rights proposals had the support of both President Truman and President Eisenhower.⁶⁵ Hearings were held on several of them,⁶⁶ but not until 1957 was any civil rights measure able to survive the opposition of the southern bloc in Congress.

II. THE CIVIL RIGHTS ACTS OF 1957 AND 1960

Though falling far short of its objective, the Civil Rights Act of 1957⁶⁷ was intended to make the fifteenth amendment bar against racial discrimination in the exercise of the franchise a living reality. In addition to creating a six member bipartisan Civil Rights Commission to "investigate allegations . . .

63 *Id.* at 160-61.

64 *Id.* at 151-54. Also recommended were the (1) creation of a civil rights unit within the Federal Bureau of Investigation, (2) establishment of civil rights enforcement units in state governments, (3) establishment of permanent state commissions on civil rights, and (4) increased professionalization of state and local police forces.

65 See presidential messages in 94 CONG. REC. 33,928, 9442 (1948); 95 CONG. REC. 2671 (1949); 96 CONG. REC. 63 (1950); 100 CONG. REC. 82 (1954); 102 CONG. REC. 143 (1956); 103 CONG. REC. 410 (1957).

66 *Hearings on S. 1725 and S. 1734, supra* note 60; *Hearings on S. 1 and S. 535 Before a Subcommittee of the Senate Committee on the Judiciary*, 83d Cong., 2d Sess. (1954); *Hearings on Miscellaneous Bills Regarding the Civil Rights of Persons Within the Jurisdiction of the United States Before Subcommittee No. 2 of the House Committee on the Judiciary*, 84th Cong., 1st Sess., ser. 11, pt. 1 (1955); *Hearings on Civil Rights Before the House Committee on the Judiciary*, 84th Cong., 2d Sess., ser. 11, pt. 2 (1956); *Hearings on Civil Rights Proposals Before the Senate Committee on the Judiciary*, 84th Cong., 2d Sess. (1956); *Hearings on Civil Rights Before Subcommittee No. 5 of the House Committee of the Judiciary*, 85th Cong., 1st Sess., ser. 1 (1957); *Hearings Before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary*, 85th Cong., 1st Sess. (1957).

In 1956 the Justice Department investigated complaints that Negro voters were being purged in large numbers from voter registration lists in ten Louisiana parishes and found widespread discrimination prevalent in each of these parishes (Bienville, Caldwell, De Soto, Grant, Jackson, LaSalle, Lincoln, Ouachita, Rapides, and Union). The following excerpts from the Attorney General's Annual Report are illustrative of the discriminatory practices involved:

In Ouachita Parish, for instance, all of the 2,388 Negro voters in one ward, but none of the white voters in that ward, were challenged. The registrar refused to accept affidavits on behalf of the challenged voters from witnesses who were from any precinct other than that of the challenged voter or from witnesses who had themselves been challenged. Further, she refused to permit a registered voter to act as a witness for more than one challenged voter. The imposition of these requirements, of course, made it practically impossible for challenged Negro voters to "prove" their right to remain on the registration rolls.

In Caldwell Parish the registrar even went to the extreme of refusing to accept registered white voters as witnesses on behalf of challenged Negro voters, stating as his grounds that the witness must be of the same race as the voter who had been challenged. In other instances he also required that the witnesses be accompanied by a law enforcement officer to "identify" them.

1957 ATT'Y GEN. ANN. REP. 107-09.

67 71 Stat. 634 (codified in scattered sections of 5, 28, 42 U.S.C.).

that certain citizens of the United States are being deprived of their right to vote and have that vote counted by reason of their color, race, religion, or national origin,"⁶⁸ Congress broadened the coverage of 42 U.S.C. 1971 to protect voting rights in special, general, and primary elections where federal officials are being selected, against interferences by private persons as well as by persons acting under color of law.⁶⁹ The Attorney General was empowered to initiate and institute civil actions to protect persons against the deprivations proscribed by the Act.⁷⁰ Moreover, the federal district courts were granted jurisdiction over such proceedings regardless of whether the party aggrieved had failed to exhaust administrative or judicial remedies provided by state law.⁷¹ Because of congressional fears that impartial southern juries would be hard to find,⁷² Congress provided that in a criminal contempt case arising under the Act, the district court judge might, in his discretion, try the case with or without a jury, except that when a person is convicted and fined more than \$300 or is imprisoned for more than 45 days, he may demand a new trial before a jury.⁷³

This was the law. But law in theory and law in action are two entirely different matters, as the first comprehensive report of the Civil Rights Commission dramatically illustrated.⁷⁴ Two years after the Civil Rights Act had gone into effect the Justice Department had filed only three suits under the new statute⁷⁵ despite substantial evidence that discrimination against Negroes seeking to vote was being widely practiced in numerous counties and parishes throughout the South.⁷⁶

68 71 Stat. 635 (1957), 42 U.S.C. § 1975c (1958).

69 71 Stat. 637 (1957), 42 U.S.C. § 1971(b) (1958).

70 71 Stat. 637 (1957), 42 U.S.C. § 1971(c) (1958).

71 71 Stat. 637 (1957), 42 U.S.C. § 1971(c) (1958). With respect to dispensing with the exhaustion doctrine the House Report which accompanied H.R. 6127 stated as follows:

Insofar as State judicial remedies are concerned, this new proposal is declaratory of existing law. In *Lane v. Wilson* (307 U.S. 268, 274 (1939)), the Supreme Court of the United States ruled that there was no requirement that a party exhaust State judicial remedies before resorting to a Federal court for relief pursuant to a Federal civil rights statute. As to the exhaustion of State administrative remedies, the proposal does change existing laws to a certain extent. In two cases, *Peay v. Cox* (190 F.2d 123 (1951)), and *Carson v. Warlick* (238 F.2d 724 (1956), *cert. denied*, 353 U.S. 910 (1957)), it was held by the courts that an exhaustion of State administrative remedies was necessary before seeking relief in the Federal district court. In the first case, the right to vote was involved and the second case involved school segregation. The Committee on the Judiciary believes that a waiver of the doctrine of exhaustion of State administrative remedies is necessary in civil-rights cases, particularly when injunctive relief is sought. . . . This is particularly true with regard to election matters where the action complained of can result in a deprivation of the individual's right to vote. H.R. REP. No. 291, 85th Cong., 1st Sess. 10-11 (1957).

72 See 103 CONG. REC. 14478 (1957). (Remarks of Senator Fulbright.) It might be noted that the Justice Department occasionally found difficulty in getting indictments in civil rights cases under criminal statutes. For instance, a Federal Grand Jury impaneled in Louisiana in December, 1956 refused to return any indictments in connection with widespread discrimination against Negroes by voting registrars in several Louisiana parishes. 1957 ATT'Y GEN. ANN. REP. 109.

73 71 Stat. 638 (1957), 42 U.S.C. § 1995 (1958).

74 See 1959 CIVIL RIGHTS REPORT 134-142.

75 1959 ATT'Y GEN. ANN. REP. 180-181.

76 See *Voting, Hearings Before the United States Commission on Civil Rights*, Montgomery, Alabama (1958-59). See also 1959 CIVIL RIGHTS REPORT 55-106.

This was a bleak beginning for an enterprise which had begun with cautious optimism. Frustration in the Justice Department ran high in the few cases that were instituted because of dilatory tactics of southern state officials,⁷⁷ many of whom also forbade the Civil Rights Division to inspect local voting records for evidence of discrimination.⁷⁸ Following two years of experience under the 1957 Act, the Assistant Attorney General in charge of the Civil Rights Division was constrained to conclude that "for some time to come, every action initiated in racial voting and registration cases will be challenged in every possible way to prevent or delay the implementation of the purpose of Congress."⁷⁹ Even the Civil Rights Commission, in its purely fact-finding capacity, was occasionally stymied in its effort to inspect local voter registration records⁸⁰ and, in one instance, was temporarily restrained from holding a scheduled hearing in Louisiana.⁸¹

In the meantime significant litigation was flowing through the federal courts where the Justice Department was gaining mixed results. When the Civil Rights Commission began to undertake its investigatory duties, the constitutionality of certain rules of procedure adopted by it was challenged in a lawsuit brought by certain voting registrars in Louisiana. It appears that the Commission would not allow witnesses responding to subpoenas and subpoenas *duces tecum* to be informed of the complaints against them or to confront their accusers and cross-examine them. The court below found nothing in the 1957

77 1959 ATT'Y GEN. ANN. REP. 181.

78 See testimony of Attorney General William P. Rogers on pending civil rights bills in the 86th Congress, *Hearings on Civil Rights Before Subcommittee No. 5 of the House Committee on the Judiciary*, 86th Cong., 1st Sess., ser. 5, 211 (1959). In another statement before the Subcommittee Congressman McCullouch observed:

The Civil Rights Act of 1957 was aimed at protecting the basic right of all eligible citizens to vote in Federal elections. But the effectiveness of this legislation has been undermined. State voting records have, in certain cases, been withheld from Federal authorities investigating alleged franchise violations. Defeat of these attempts in the courts has triggered resort to more drastic means of avoidance. Pending or proposed in the legislatures of several States, I am informed, are bills to authorize the outright destruction of voting records soon after elections in order to prevent their falling into the hands of Federal investigators. Such measures bode no good for the cause of representative government. *Id.* at 151.

79 1960 ATT'Y GEN. ANN. REP. 177. In the previous report the Acting Assistant Attorney General, Joseph M. F. Ryan, Jr. lamented the fact that "a great deal of time and effort has been spent in answering attacks made on the constitutionality of the Civil Rights Act of 1957, and it is apparent from the tactics which are being pursued by the defendants that the Division will be faced with the same problem in every suit which is filed under the Act. These efforts to hinder and hamper the discharge of duties imposed under the Act have, of course, added a substantial burden to the already heavy workload of the Division." 1959 ATT'Y GEN. ANN. REP. 181. On the other hand, Congressman Peter W. Rodino, Chairman of Subcommittee No. 5, appeared dissatisfied with the record of the Civil Rights Division under the 1957 Act in view of former Attorney General Brownell's statement that voting denials were widespread. In answer to a query on this point, Attorney General Rogers pointed out that complaints under the Act were few, evidence was difficult to procure, in addition to which the Justice Department was exercising great care in selecting for prosecution only those cases which would give sure support to the Government's position. See *Hearings Before Subcommittee No. 5*, *supra* note 78, at 214-215. The Civil Rights Commission also reported that "its [Civil Rights Division] legal actions were disappointing in number, nature, and results." 1959 CIVIL RIGHTS REPORT 132.

80 See 1959 CIVIL RIGHTS REPORT 70-71. See also testimony of Gordon M. Tiffany, Staff Director, Commission on Civil Rights, *Hearings on Civil Rights Before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary*, 86th Cong., 1st Sess., pt. 1 at 247-255 (1959).

81 1959 CIVIL RIGHTS REPORT 99-100.

Act authorizing the Commission to deprive witnesses of these procedural guarantees.⁸² The Supreme Court, however, Justices Black and Douglas dissenting, held that since the Commission was not an adjudicatory but rather an investigatory body, the rules of procedure did not violate the Due Process Clause of the fifth amendment.⁸³

A three-judge federal district court, in *United States v. Raines*,⁸⁴ held the 1957 Act unconstitutional since the statute was construed to reach the discriminatory actions of private persons as well as state officials. The Supreme Court, on appeal, reversed,⁸⁵ holding that, since discriminatory state action, clearly within the proscription of the fifteenth amendment, was actually involved, the lower court erred in reaching a constitutional question it did not have to decide. The same issue was raised in a second case where the United States brought suit against members of the White Citizens' Council and the Registrar of Voters in Washington Parish, Louisiana, for conspiring to purge registration rolls and thus effectively disfranchising 85% of the Negro voters in that parish.⁸⁶ It was clear to the Court, and admitted by defendants, that the purge was conducted under color of state law.⁸⁷ The court refused to strike the statute down on the ground that it *might* be read to cover the actions of private individuals.⁸⁸ In still another proceeding these challenges of the registration status of Negroes, though initiated under valid state law, were nevertheless regarded as "massively discriminatory in purpose and effect, and as such unconstitutional."⁸⁹

The Justice Department suffered a setback, however, in an action against the State of Alabama, the Board of Registrars of Macon County, Alabama, and two individual registrars who had resigned after refusing to produce voting records in their custody on the advice of Alabama's Attorney General.⁹⁰ The proceeding was vitiated by the court's holding that (1) the registrars, having resigned, were no longer suable in their official capacities, (2) the Board

82 *Larche v. Hannah*, 177 F. Supp. 816 (W.D. La. 1959).

83 *Hannah v. Larche*, 363 U.S. 420 (1960). See the concurring opinion of Justice Frankfurter at 486-93.

84 172 F. Supp. 552 (M.D. Ga. 1959). This was the first case brought by the Attorney General under the 1957 Act. It was an action against certain registrars of Terrel County, Georgia, to prevent them from arbitrarily refusing to allow Negroes to register. The federal district court rejected the contention that this was not a legitimate exercise of its equitable jurisdiction and further ruled that Congress had the authority under the Constitution to authorize injunctive relief without regard to other state remedies which might be — and in this case were — available.

85 *United States v. Raines*, 362 U.S. 17 (1960).

86 *United States v. McElveen*, 180 F. Supp. 10 (E.D. La. 1959), *aff'd* 362 U.S. 58 (1960).

87 *Id.* at 13. In an earlier opinion denying the defendant's motion to dismiss, the court said: "The legislative history of this legislation shows that Congress was aware of the widespread attempt to disenfranchise the Negro, overtly through statutory enactments, and covertly through discriminatory administration of voting laws. Congress was also aware that disenfranchisement can be accomplished only with the cooperation of persons acting under color of state law since registration rolls are in the custody and under the control of state officers." *United States v. McElveen*, 177 F. Supp. 355, 360 (1959).

88 *United States v. McElveen*, 177 F. Supp. 355, 359-60 (1959).

89 *United States v. McElveen*, 180 F. Supp. 10, 13 (E.D. La. 1960).

90 *In re Wallace*, 170 F. Supp. 63 (M.D. Ala. 1959). In this case George C. Wallace, Judge of the Third Judicial Circuit of Alabama, impounded the voting records of certain Alabama counties in defiance of the Civil Rights Commission's request to examine such records. After rejecting the contention that the enforcement of the subpoenas would unconstitutionally invade state sovereignty, the court ordered Wallace to make the records available to the Commission. *Id.* at 70.

of Registrars did not constitute a suable entity, and (3) the 1957 Act did not authorize any civil rights action against the State.⁹¹

The government's experience with these few cases was no source of encouragement. In fact, the futility of government by lawsuit was becoming all too apparent. The Civil Rights Commission's dissatisfaction over the delays inherent in litigation was certainly apparent.⁹² As Anthony Lewis of the *New York Times* wrote, "the most important single conclusion drawn by the commission from its investigation is that lawsuits are a feeble, perhaps hopeless weapon against these defenses of intimidation and evasion."⁹³ He continued:

Litigation case-by-case can hardly make a significant dent in the hardened areas of resistance to Negro voting. Even the resources of the Justice Department, albeit used freely by a weakly led Civil Rights Division, have not succeeded in registering a single Negro voter through litigation since the passage of the 1957 Civil Rights Act permitting Justice Department intervention.⁹⁴

Accordingly, in its first official report to the President and Congress, the Civil Rights Commission recommended corrective measures intended to obviate the problems of the *Alabama* decision, and measures which would rely less on judicial and more on administrative action. Among its several recommendations were proposals that the President appoint temporary federal registrars who would be empowered to register would-be registrants in accordance with state qualification laws, after certification by the Commission that they had in fact been discriminated against in previous attempts to register and vote for federal officials.⁹⁵

After many days of hearings, long hours of congressional debate, and weeks of relentless pleading by civil rights organizations, Congress finally passed

91 *United States v. Alabama*, 171 F. Supp. 720 (M.D. Ala. 1959), *aff'd* *United States v. Alabama*, 267 F.2d 808 (5th Cir. 1959), *cert. denied*, 361 U.S. 893. While the case was pending in the Supreme Court, Congress enacted the Civil Rights Act of 1960 which expressly allowed the Attorney General to bring such suits against the State. Whereupon the Supreme Court, without reaching the merits of the case, remanded it to District Court for the Middle District of Alabama with instructions to reinstate the action as to the State of Alabama. *United States v. Alabama*, 362 U.S. 602 (1960).

92 1959 CIVIL RIGHTS REPORT 140.

93 N.Y. Times, Sept. 13, 1959, sec. IV, p. 6.

94 *Ibid.*

95 The Commission also recommended that (1) the Census Bureau be directed to compile nationwide and territorial statistics regarding the total number of persons registered and voting on the basis of race, color, and national origin, (2) Congress require all state registration and voting records to be preserved for five years, (3) state officials be legally barred from preventing individuals to register, vote, and have their votes counted in any federal election, and (4) the Commission be empowered to go directly to an appropriate federal district court for an order enforcing its subpoenas. These proposals were based on the hard facts that (1) too little information exists relative to nonvoting in the United States, (2) public records pertaining to registration and voting are difficult to procure, owing in part to the total lack of uniform state laws on the matter, (3) many persons were being denied the right to register and vote because state registration boards have failed to function for long periods of time and have failed to enforce state registration laws, or have restricted registration to such short periods as to prevent most citizens from registering, (4) effective administration of the Civil Rights Act is hampered by the fact that the Commission has to call upon another governmental agency (Justice Department) to compel witnesses to comply with its orders, and (5) existing judicial remedies under the Act of 1957 are insufficient. 1959 CIVIL RIGHTS REPORT 134-42. Note also Commissioner John S. Battles' dissent at 142. Commissioners John A. Hannah, Theodore M. Hesburgh, and George M. Johnson joined in a separate statement recommending, in addition to the Commission proposals, a constitutional amendment to extend the right to vote to every American citizen who meets state age and residence requirements. This, of course, would eliminate all barriers to voting, including literacy tests of any kind. "An important aim of this

the Civil Rights Act of 1960.⁹⁶ Like any major piece of legislation this Act was the result of intense interparty and intergroup negotiation.⁹⁷ Much of the debate in Congress, in the communications media, and among civil rights groups centered on the relative merits and strengths of the Civil Rights Commission's proposal for federal registrars as opposed to the Attorney General's plan for voting referees. In fact, the division among civil rights groups over which plan to support led to an interesting strategy conference between them and a staff member of the Civil Rights Commission,⁹⁸ an incident which led some Congressmen to question the Commission's objectivity.⁹⁹ Most congressional leaders realized, however, that the Eisenhower Administration's bill would have to be accepted if any Civil Rights measure were to be enacted, and it was especially propitious to pass such a measure in an election year and at a time when the American Negro revolution was waxing strong. Supported by a coalition of Republicans and Northern Democrats¹⁰⁰ the bill stopped about halfway between Senator Hart's proposal to establish a congressional elections commission to conduct elections in the states for senators and representatives¹⁰¹ and the insistence of Southern Democrats for retention of the status quo.

Specifically, the Act provided for court-appointed voting referees to register voters in areas where patterns of racial discrimination are found to exist.¹⁰² To facilitate finding such a pattern the Act further provided for the preservation of all registration and voting records for twenty-two months from the date of any general, special, or primary election.¹⁰³ Moreover, the government

amendment," the three Commissioners noted, "would be to remove the occasion for further direct Federal intervention in the States' administration and conduct of elections by prohibiting complex voting requirements and providing clear, simple, and easily enforceable standards." *Id.* at 143-45. Commissioners Robert G. Storey and Doyle E. Carlton took exception to the proposal on the ground that the same result could be achieved by law. *Id.* at 145.

⁹⁶ 74 Stat. 86 (1960).

⁹⁷ For an excellent description of the political dynamics surrounding the Civil Rights Bill from its introduction in Congress through final passage see BERMAN, *A BILL BECOMES LAW* (1962).

⁹⁸ N.Y. Times, Feb. 4, 1960, p. 1, col. 4.

⁹⁹ See, e.g., *Hearings on Voting Rights Before the House Committee on the Judiciary*, 86th Cong., 2d Sess., ser. 15, at 3-4 (1960).

¹⁰⁰ 13 CONGRESSIONAL QUARTERLY ALMANAC 559, 563 (1957).

¹⁰¹ S. 2535, 86th Cong., 1st Sess. (1959).

¹⁰² 74 Stat. 90 (1960), 42 U.S.C. § 1971(e) (Supp. IV 1960). Under this section the Attorney General is empowered to ask the court, in a case brought by him where the court finds a person to have been deprived of the right to register or vote, to make a finding, after the relevant parties have been duly notified and granted a hearing, "whether such deprivation was or is pursuant to a pattern or practice [of discrimination]." If the court so finds, then any person of that race living within the affected area will, after filing an application with a voting referee, be entitled to a court order declaring him a qualified voter provided that he can show that he is qualified to vote under the laws of the state and that he has been denied the right to vote since the pattern of discrimination was made by the court. In order to establish whether these conditions are met the court may appoint voting referees who receive these applications and take all relevant evidence in ex parte hearings. The referee's findings are then submitted to the court, copies are sent to the state attorney general and to every other party to the proceeding, accompanied by an order to show cause, within ten days, why an order should not issue in accordance with the report of the voting referee. The burden of proof is on the state to show that the facts found by the referee are erroneous. If state law requires a literacy test prior to being allowed to register to vote, the applicant's literacy is determined solely on the basis of the answers the voting referee included in his report.

¹⁰³ 74 Stat. 88 (1960), 42 U.S.C. § 1974 (Supp. IV, 1960). Upon a written demand by the Attorney General or his representative, such records were to be made available for inspection, reproduction, or copying and the district court was empowered to order the production of such records.

was expressly given the power to make the State a party to any action brought under the civil rights statute.¹⁰⁴ The voting referee proposal, pushed by the Attorney General with the President's support, constituted an outright repudiation of the federal registrar plan recommended by the Civil Rights Commission.¹⁰⁵ Together with official — and perhaps unwarranted — doubts about the constitutionality of the Commission's plan¹⁰⁶ the Justice Department, by resting its case for voting referees on the fifteenth amendment, insisted that state as well as federal elections be covered by the legislation.¹⁰⁷

Deputy Attorney General Lawrence E. Walsh, speaking for the Justice Department, seemed to have made a telling point:

State elections must be included in the relief given by Congress for many reasons; we cannot tolerate Jim Crow at the ballot box. It would be ironic indeed if while Federal courts assert the illegality of segregation in public schools, in railroad waiting rooms, in parks, and on public golf courses, it is by Federal legislation expressly condoned in the voting place. State elections may be less dramatic but they can in reality be more important than Federal elections. They decide who will run the schools and who will enforce the laws, who will select the juries, and who will be the local judge. It is only in the right to vote in these elections that there lies the kernel of hope for the ultimate eradication of racial segregation and the long-awaited fulfillment of a basic promise that the protection of the law shall be equal to all.¹⁰⁸

Yet the question remained whether the Attorney General's plan, or even the Commission's unenacted federal registrar plan, constituted effective solutions to the problem of discrimination at the polls. In either case the aggrieved registrant would have to plod his way through a legal and judicial quagmire to vindicate his right to vote. Under the 1960 Act voting referees are sent into the field only after a federal district court finds a pattern of discrimination in a given voting district. To appoint referees in an adjacent district where discrimination is also practiced, still another trial, involving substantial proof of discrimination by election officials, would be necessary. Also, under the Commission's plan, the enlistment of federal registrars would have obtained only after a finding of discrimination by the Commission in a *quasi-judicial proceeding* — which finding, incidentally, would have been reviewable by the courts. The fact that lengthy lawsuits were required for the implementation of

104 74 Stat. 92 (1960), 42 U.S.C. § 1971(c) (Supp. IV, 1960).

105 Bills to implement the federal registrar proposal were introduced shortly after the Commission released its 1959 report by Senators Humphrey, Morse, and Javits. See S. 2684, 86th Cong., 1st Sess. (1959); S. 2719, 86th Cong., 1st Sess. (1959); and S. 2783, 86th Cong., 2d Sess. (1960).

106 Since the Civil Rights Commission is not a quasi-judicial body, the Justice Department questioned the constitutionality of the Commission making determinations regarding the conduct of individual registrars which could result in voting referees taking over the functions of such registrars where federal elections are concerned. See Statement of Deputy Attorney General Lawrence E. Walsh, *Hearings On Voting Rights*, *supra* note 99, at 3, 41. See also President Eisenhower's comment in a Washington news conference. N.Y. Times, Jan. 14, 1960, p. 18, col. 4.

107 *Hearings on Voting Rights*, *supra* note 99, at 12, 41. The Justice Department also alleged that there was no assurance that a person would be allowed to vote in a federal election once registered by the federal registrar. The referee plan on the other hand would allow the voting referee to attend the polls to actually insure that discrimination is not practiced.

108 *Id.* at 45.

both plans led Professor Robert J. Harris of the University of Michigan Law School to predict that "they are virtually certain to become dead letters once enacted. At most, they will accomplish token registration in a handful of isolated voting districts."¹⁰⁹

III. ENFORCEMENT OF CIVIL RIGHTS ACTS

Though hardly calculated to bring a free and untrammelled suffrage to the entire South, the Civil Rights Acts were not dead letters. At this writing the Justice Department has instituted approximately 45 suits under the Acts¹¹⁰ although only six were filed prior to February 1961.¹¹¹ The relative paucity of suits filed by the Justice Department under the 1957 Act was a reflection of the difficulty experienced in gaining access to voter registration records kept by uncooperative and hostile southern state officials. Title III of the Civil Rights Act of 1960, providing for the preservation, production, and inspection of voting records, has accordingly facilitated enforcement proceedings. The difference in the respective records of the Eisenhower and Kennedy Administrations in instituting voting suits may have reflected the latter's greater ability to do business with southern politicians since the Republican Party, as Richard Longaker puts it, "did not have the advantage of informal communication with party leaders in the South."¹¹²

According to the Attorney General's 1962 report active investigations of alleged violations of Sections 1971 (a) and 1971 (b) were being conducted in 45 and 17 counties respectively.¹¹³ Moreover, Justice Department demands for inspection of voting records under Title III of the 1960 Act were made in 37 counties and parishes while many more such demands were being contemplated for 1963.¹¹⁴ In only 13 of these jurisdictions was resort to the courts necessary for the production of such records for inspection and copying.¹¹⁵

It should be pointed out, however, that the budgetary and human resources of the Civil Rights Division are severely limited. Since the Division is responsible for the enforcement of many civil rights, it is simply not equipped to launch a massive legal assault in every local community where the Civil Rights Commission has found racial discrimination in voting. Its probing operations are concentrated in selected critical areas where the Division's energies are mobilized to gather evidence preparatory to filing suit in one of the federal courts. This is done with a meticulous regard for facts and the peculiar circumstances surrounding each case. The labor which goes into these cases was recently described as follows:

The nature of these [voting] cases is illustrated by *United States v. Penton*. . . . The suit was filed in August 1961 against

¹⁰⁹ N.Y. Times, Feb. 25, 1960, p. 28, col. 8.

¹¹⁰ On July 18, 1963, Attorney General Kennedy testified that 42 suits had been filed under the 1957 and 1960 Acts. *Hearings on S. 1731 and S. 1750 Before the Senate Judiciary Committee*, 88th Cong., 1st Sess. 100 (1963). A check of the Civil Liberties Docket discloses several additional filings by the Justice Department since that time.

¹¹¹ See 1962 ATT'Y GEN. ANN. REP. 162.

¹¹² Longaker, *The President and the Civil Rights of Negroes*, 1962 AMERICAN GOV'T ANN. 61.

¹¹³ 1962 ATT'Y GEN. ANN. REP. 165.

¹¹⁴ *Ibid.*

¹¹⁵ *Ibid.*

the registrars of voters of Montgomery County, Alabama, and against the State of Alabama. Investigation showed that in 1960 some 63,000 white persons and 33,000 Negro persons of voting age lived in the county, yet as of December 1961, there were 33,846 white persons but only 3,760 Negroes registered to vote. An analysis of the registrars' records showed that between January 1956 and June 1961, 13,900 applications for registration were filed with the board of registrars. Overall, 96.6% of the applications of white persons were approved and 75.4% of the applications of Negroes were rejected. Staff attorneys, both in the office and in the field, analyzed and correlated the records available, interviewed witnesses, prepared and argued motions, and made all other necessary preparations for the trial which lasted five days in January 1962. The Government called 87 witnesses, the defense about 100. The Government introduced 69 exhibits. One exhibit consisted of five filing cabinets containing over 10,000 documents, all of them thoroughly indexed, analyzed and processed. The Division then filed a largely factual brief of 293 pages and attachment volumes depicting graphically and statistically every item of the many facets of racial discrimination that characterized registration in that county in recent years. The case was awaiting decision at the end of the fiscal year.¹¹⁶

Calling upon the federal courts for assistance in the enforcement of the Civil Rights Acts is, however, always a last resort. Conciliation and negotiation are, as a matter of course, the initial instruments applied by the Civil Rights Division.¹¹⁷

The enforcement policy of the Division was facilitated considerably by court approval of the 1960 Act. In *Dinkens v. Attorney General*¹¹⁸ the validity of Title III of the 1960 Act, providing for the inspection of state voting records, was sustained against federal constitutional objections by the State of Alabama. In that case the Attorney General sought a court order requiring the Montgomery County, Alabama Board of Registrars to produce voting records for inspection by U. S. officials, after which the state attorney general obtained a temporary restraining order from a state court forbidding the former to inspect or copy such records in any county in the state.¹¹⁹ The action was removed to a federal district court where the two proceedings were consolidated. Observing that the inspection of voting records was a necessary step in protecting the right to vote against debasement on account of racial discrimina-

¹¹⁶ *Id.* at 162.

¹¹⁷ To prove and prevent these violations of law, the Department conducts investigations where there are indications that the right of Negroes to vote is being interfered with by discrimination or intimidation. These investigations involve a thorough analysis of the registration and voting records of the counties involved and extensive interviews with persons in the county. If it is concluded that discrimination has occurred, the Department makes every effort to correct the illegal practices by bringing them to the attention of state and local officials and by exploring, in advance of litigation, all possibilities of self-correction. This policy of the Attorney General has been followed in all instances. Where negotiation is unavailing, a suit is filed under Section 1971. *Id.* at 161.

¹¹⁸ 285 F.2d 430 (5th Cir. 1961).

¹¹⁹ 5 RACE REL. L. REP. 766 (1960).

tion,¹²⁰ the court regarded Title III as appropriate legislation under the fifteenth amendment¹²¹ since it constituted "an effective means whereby preliminary investigations of registration practices can be made in order to determine whether or not such practices conform to constitutional principles."¹²² The argument that Title III violated the Ex Post Facto Clause was rejected in *United States v. Association of Citizens Councils of Louisiana*.¹²³

It was alleged by the State of Louisiana that the 1960 Act delegated a non-judicial function to the federal courts and injected them into a matter which cannot properly be regarded as a "case or controversy" under Article III;¹²⁴ it was also contended that the 1960 Act violated the Tenth Amendment.¹²⁵ A three-judge federal district court ruled against the state on all three points. Because the Civil Rights Act interferes with a state's power to regulate elections does not mean that it violates the Tenth Amendment. In so ruling the court was emphasizing an old and rather elementary Marshallian doctrine that the Tenth Amendment is no bar to the legitimate exercise of implied or express powers, for to say "that a congressional act is unconstitutional because it interferes with the reserved powers of the states . . . is 'an objection to the Constitution itself.'"¹²⁶ Since congressional control over federal elections is clearly implied by Article I, Section 4, Congress may employ all means "necessary and proper" for protecting the integrity of those elections. And the court emphatically maintained that the act of registering to vote is an indivisible part of the electoral process.¹²⁷ Since the act of registration, moreover, applies both to state and federal elections, "any interference with the qualified voter's right to register is therefore interference with a federal election."¹²⁸ In pointing to the significance of the registration process, the court said:

The Civil Rights Act of 1960 is based on the fact, obvious to

120 The same court, in *In re Wallace*, 170 F. Supp. 63 (M.D. Ala. 1959), stated:

The authority delegated to the Federal Government by the Fifteenth Amendment to the Constitution of the United States is undoubtedly the authority under which the Congress of the United States was acting when the Civil Rights Act of 1957 was passed. The provision in the Act providing for investigation of alleged discriminatory practices, including inspection of voting and other pertinent records, must be considered to be an essential step in the process of enforcing and protecting the right to vote regardless of color, race, religion, or national origin. That part of the Act is, therefore, by the Court considered "appropriate legislation" within the meaning of Section 2 of the Fifteenth Amendment. *Id.* at 67.

121 *State ex rel. Gallion v. Rogers*, 187 F. Supp. 848 (M.D. Ala. 1960), *aff'd per curiam* 285 F.2d 430 (5th Cir. 1961). See also *United States v. Hildreth*, 6 RACE REL. L. REP. 185 (N.D. Ala. 1961); *In re Palmer*, 5 RACE REL. L. REP. 774 (E.D. La. 1960); *Kennerly v. Bruce*, 298 F.2d 860 (5th Cir. 1962); *United States v. Lynd*, 301 F.2d 818 (5th Cir. 1962).

122 *State ex rel. Gallion v. Rogers*, 187 F. Supp. 848, 853 (M.D. Ala. 1960).

123 The court *per curiam* said: "We find no violation of this clause [ex post facto] since Section 301 operates only prospectively and not retrospectively as to any criminal prosecution. It is well settled, of course, that the prohibition against *ex post facto* legislation applies only to criminal proceedings and not to civil matters, such as this." *United States v. Association of Citizens Councils of Louisiana*, 187 F. Supp. 846, 847-48 (W.D. La. 1960).

124 *United States v. Manning*, 215 F. Supp. 272 (W.D. La. 1963).

125 In an earlier case, a statutory three-judge federal district court held that the tenth amendment, limited as it is by the fourteenth and fifteenth amendments, was not violated by the fact that the Civil Rights Act of 1960 authorized a federal district judge to sign a certificate indicating that a specific person is qualified to vote. *United States v. Manning*, 206 F. Supp. 623 (W.D. La. 1962).

126 *United States v. Manning*, 215 F. Supp. 272, 283 (W.D. La. 1963).

127 *Id.* at 284.

128 *Ibid.*

all, that violations of suffrage rights are "usually accomplished through discriminatory application and administration of state registration laws." In adopting the Act, Congress attempted to preserve the integrity of elections at its most significant point — the Registration Office. The registration of voters is relatively modern. For the "original understanding" of Section 4 to have meaning today, "manner of holding elections" therefore must be read as referring to the entire electoral process, from the first step of registering to the last step, the State's promulgation of honest returns.¹²⁹

The court held, accordingly, that the 1960 Act constituted "appropriate legislation" under the fourteenth and fifteenth amendments, for it was clearly intended to guarantee to qualified voters the right to register and vote.¹³⁰ Furthermore, states' rights were hardly infringed by the Act since no attempt was made to establish voter qualifications or to substitute federal for state registrars.¹³¹ But the court did not suggest that there are constitutional bars to any federal registrar plan.

Against the objection that 42 U.S.C. § 1971(e) compels the court to exercise non-judicial functions, the court answered that a judicial determination as to whether particular individuals are qualified to vote is made only as a result of a lawsuit in which "the court makes legal decisions and renders judgment after passing on issues of fact and law."¹³² Nor does the use of voting referees thrust the court improperly into the arena of administration, for the court draws upon a whole list of precedents to show that the appointment of analogous officers like masters, referees in bankruptcy, and receivers are in line with the traditional authority exercised by courts of equity.¹³³ The voting referee is simply an investigative officer who reports his findings to the court which then makes a determination on the basis of these findings whether an individual applicant is being unconstitutionally denied the right to register and vote.¹³⁴ Finally, the objection that the court's obligation to find a pattern or practice of discrimination was not an adversary proceeding, was emphatically rejected. This argument, resting upon a misconception of the nature of suits arising under the 1960 act, is not a controversy between Negroes and the State, but rather between the State and the United States. As guardian of the public interest, the United States brings suit in its own name to vindicate not just the rights of certain Negroes, but the "public interest in the constitutional right of all citizens to be free from racial discrimination in exercising voting rights."¹³⁵

Positive results were achieved in several of the suits filed by the Justice Department, even though when measured against the extent of racial discrimination in voting, these results were disappointing. Since 1957 it appears that about 6,000 Negroes have actually been registered as a direct result of

129 *Ibid.*

130 *Id.* at 289.

131 *Ibid.*

132 *Id.* at 290.

133 *Id.* at 292.

134 *Id.* at 294.

135 *Id.* at 295.

court action.¹³⁶ But in several instances the courts have been reluctant to issue orders or have altogether denied the Government's request for temporary injunctions against discriminatory acts by registrars,¹³⁷ and have occasionally construed the Civil Rights Acts so narrowly as to defeat their broad purposes.¹³⁸ Though voter registration records are now available upon demand by the Attorney General, the achievements of the Civil Rights Division under 42 U.S.C. § 1971 offer little hope for great expectations. In several cases federal district courts have refused to make a finding of a pattern or practice of discrimination. For example, after making innumerable findings of discrimination in registration in Terrell County, Georgia, and after enjoining the continuation of these discriminatory practices,¹³⁹ the court did not consider itself bound to make a finding under 42 U.S.C. § 1971(e) that a pattern or practice of discrimination existed.¹⁴⁰ As a matter of equitable discretion the court chose not to do so on the assumption that the original injunctions were being obeyed. As a matter of policy the court said: "in order to preserve a healthy federalism no more findings and decrees should be made in this area of conflict between federal law and state action than are necessary."¹⁴¹ But the court retained jurisdiction of the case so as not to prejudice the right of the United States to seek such a finding in the event of any subsequent violation of the court's decrees.¹⁴² We would note parenthetically that as a result of slowdown tactics adopted by the registrars only some 50 Negroes have been registered in Terrell County since the court's original decree.¹⁴³

In the few instances where the court has found a pattern or practice of discrimination to exist no voting referees have yet been appointed. Instead, the court has elected to issue comprehensive decrees providing for extensive judicial supervision of the conduct and behavior of local registrars. For example, in one instance, after ordering the registration of 54 specified Negro citizens in Macon County, Alabama,¹⁴⁴ the court required monthly reports of the "dates and places of holding voter registration, the name, race, and date of every application received, and action taken by the Registrars, and the date the certificate of registration was mailed or notification of rejection sent."¹⁴⁵ The decree required that copies of all notifications of rejection accompany the

136 See 1963 U.S. COMM. ON CIVIL RIGHTS REP. 37-50.

137 See, e.g., *United States v. Daniel*, Civil No. 1655, S.D. Miss., Jan. 4, 1963, 8 RACE REL. L. REP. 154 (1963); *United States v. Lynd*, 301 F.2d 818 (5th Cir. 1962); *United States v. Lynd*, 321 F.2d 26 (5th Cir. 1963); *United States v. Atkins*, 210 F. Supp. 441 (S.D. Ala. 1962), *rev'd*, 323 F.2d 733 (5th Cir. 1963); *United States v. Wood*, 6 RACE REL. L. REP. 1069 (S.D. Miss.), *rev'd*, 295 F.2d 772 (5th Cir. 1961); *United States v. Board of Education of Greene County*, 7 RACE REL. L. REP. 770 (S.D. Miss. 1962); *United States v. Edwards, Sheriff*, Civil No. 3413 (Jackson Div.), S.D. Miss., April 1, 1963.

138 See, e.g., *United States v. Dogan*, 206 F. Supp. 446 (N.D. Miss. 1962), *rev'd*, 314 F.2d 767 (5th Cir. 1963) and *United States v. Duke*, Civil No. 4561, N.D. Miss., June 23, 1963.

139 *United States v. Raines*, 189 F. Supp. 121 (M.D. Ga. 1960).

140 *United States v. Raines*, 203 F. Supp. 147 (M.D. Ga. 1961).

141 *Id.* at 151.

142 *Id.* at 152.

143 1963 U.S. COMM. ON CIVIL RIGHTS REP. 39.

144 *United States v. Alabama*, 192 F. Supp. 677 (M.D. Ala. 1961), *aff'd*, 304 F.2d 583 (5th Cir. 1962). In this case the court held that the court's power is not limited to preventive relief, but that mandatory relief is permitted by the statute and is within the court's equity powers.

145 *Alabama v. United States*, 304 F.2d 583, 585 (5th Cir. 1962).

report and also prescribed that voting records should be open to inspection by federal officials from whom the court required similar monthly reports.¹⁴⁶ Monthly progress reports were also required in *United States v. Manning*,¹⁴⁷ where the court ordered certain registrars to accept drivers' licenses and other unspecified records as proof of registrants' identification after striking down as violative of the fifteenth amendment the practice that applicants for registration establish their identity by being known personally by the registrar or by being identified by a registered white voter. An all-pervasive decree was also issued in Montgomery County, Alabama, where a federal district court found that some 1,070 Negroes had been denied registration on account of their race even though qualified to register and vote under state law.¹⁴⁸

With reference to the enforcement of the Civil Rights Acts the Civil Rights Commission noted that "the only way to eliminate the [discriminatory] practices by litigation is to win comprehensive decrees with intensive reporting requirements so that literally every act of every registrar is known to the court."¹⁴⁹ But this is a herculean task for any court.

Yet the record is not entirely bleak. The federal government has achieved notable victories in knocking out segregated voting facilities. For example, the Bibb County, Georgia Democratic Executive Committee had established separate polling places and voting machines for Negro and white voters in addition to tabulating and publishing election returns on a racially designated basis — practices which were held to violate the fourteenth and fifteenth amendments as well as the Civil Rights Acts.¹⁵⁰ Earlier, in a private suit, the court had declared similar practices in violation of the same constitutional and statutory provisions.¹⁵¹ And very recently, the Supreme Court struck down as clearly contravening the fourteenth amendment's Equal Protection Clause a Louisiana statute requiring the race of candidates to be designated on all election ballots; the vice here was "in the placing of the power of the State behind a racial classification that induces racial prejudice at the polls."¹⁵²

In still other cases several hundred Negroes have been restored to registration rolls after their status as voters had been successfully challenged by local citizen groups in cooperation with certain public officials. A typical case is *United States v. Wilder*.¹⁵³ There the White Citizens' Council of Jackson Parish, Louisiana challenged the registration status of over eighty-five per cent of the Negro voters in the parish with the result that by August 31, 1962, some 5,613 persons, representing about eighty-four per cent of eligible white voters, and 478 Negroes, representing only eighteen per cent of eligible Negroes, were registered to vote. This contrasts with the 2,535 Negroes on the registration

146 *Ibid.*

147 205 F. Supp. 172 (W.D. La. 1962).

148 *United States v. Penton*, 212 F. Supp. 193 (M.D. Ala. 1962).

149 1963 U.S. COMM. ON CIVIL RIGHTS REP. 24.

150 *United States v. Bibb County Democratic Executive Committee*, 222 F. Supp. 493 (M.D. Ga. 1962). *Accord*, *United States v. Jones County Democratic Executive Committee*, Civil No. 1905, M.D. Ga., June 26, 1963, 8 RACE REL. L. REP. 1091 (1963). *Cf. Sharp v. Lucky*, 252 F.2d 910 (5th Cir. 1958).

151 *Anderson v. Courson*, 203 F. Supp. 806 (M.D. Ga. 1962).

152 *Anderson v. Martin*, 375 U.S. 399, 402 (1964). *Cf. McDonald v. Key*, 224 F.2d 608 (10th Cir.), *cert. denied*, 350 U.S. 895 (1955).

153 222 F. Supp. 749 (W.D. La. 1963).

rolls in 1960. Errors, omissions, and handwriting differences on the original application cards constituted the basis for the challenges against Negroes, but these deficiencies did not work to disfranchise several thousand white voters many of whom were guilty of similar irregularities. Having found the purge in violation of the Civil Rights Act and the Constitution, the court ordered the reinstatement of 953 Negroes removed from the current roll of qualified voters.¹⁵⁴ In an interesting state case the Florida Supreme Court struck down a state statute as violative of the state and federal constitutions for not providing the elements of due process of law, namely notice and hearing, prior to striking the name of a qualified voter from the registration books.¹⁵⁵

Another impediment to Negro registration is the so-called voucher requirement. In Bullock County, Alabama, for example, the disparity in voter registration between white and Negro residents was perpetuated by the fact that each applicant for registration was required to have a registered voter vouch for him and by the fact that no registered voter was permitted to vouch for more than two applicants in any one year. In *United States v. Alabama*¹⁵⁶ the practice was held unconstitutional and violative of the Civil Rights Act.

There have also been several instances of intimidation and reprisals against Negroes rash enough to decide to vote. Three cases which gave rise to a good deal of publicity in the nation's press originated in Tennessee. These cases, incidentally, were the first to be filed by the Civil Rights Division under 42 U.S.C. § 1971(b).¹⁵⁷ In Haywood County, Tennessee, several individuals, landowners, merchants, banks, and corporations retaliated against Negroes registering to vote or attempting to do so by resorting to devices such as terminating employment, refusing to sell goods, give credit, or lend money, evicting tenants, and other economic penalties. A consent judgment was finally entered on May 2, 1962, prohibiting these discriminatory acts.¹⁵⁸ Similarly, in *United States v. Atkeison*,¹⁵⁹ certain landowners of Fayette County, Tennessee, were enjoined from evicting Negro tenants who decided to vote. Another interesting case arose in Walthall County, Mississippi, where a Negro was prosecuted in a state proceeding for breach of peace after he set up a voter registration school in the county. The Justice Department maintained that the prosecution would intimidate Negro residents of the county by discouraging Negroes from registering to vote, and on that ground sought a temporary restraining order to enjoin the proceeding.¹⁶⁰ In overruling the federal district court's refusal to stay the state criminal proceeding the Court of Appeals noted that the alleged coercion involved in this case was of the kind the Civil Rights Act of 1957 was intended

154 *Id.* at 754.

155 *Florida ex rel. Barancik v. Gates*, 134 So. 2d 497 (Fla. 1961).

156 Civil No. 1677-N, M.D. Ala., Sept. 13, 1961, 7 RACE REL. L. REP. 1146 (1962). *Cf.* *United States v. Manning*, 205 F. Supp. 172 (W.D. La. 1962).

157 See 1961 ATT'Y GEN. ANN. REP. 189-90.

158 *United States v. Beaty*, Civil No. 4065, W.D. Tenn., May 2, 1962, 7 RACE REL. L. REP. 484 (1962) and *United States v. Barcroft*, Civil No. 4121, W.D. Tenn., May 2, 1962, 7 RACE REL. L. REP. 484 (1962).

159 Civil No. 4131, W.D. Tenn., Dec. 30, 1960, 6 RACE REL. L. REP. 200 (1961). *Cf.* *United States v. Deal*, Civil No. 8132, W.D. La., Feb. 3, 1961, 6 RACE REL. L. REP. 474 (1961).

160 *United States v. Wood*, Civil No. 1670, S.D. Miss., Sept. 21, 1961, 6 RACE REL. L. REP. 1069 (1961).

to reach.¹⁶¹ But in *United States v. Board of Education of Greene County*,¹⁶² a federal district court ruled that the failure of a school board to rehire, after the expiration of a one-year contract, a teacher who had participated in a voter registration campaign and lawsuit, would not result in the intimidation of Negroes seeking to register to vote. Additional cases involving intimidation and coercion under 42 U.S.C. § 1971(b) are now pending in the federal courts.¹⁶³

These cases, however, are exceptions to the rule. Federal court action, as suggested above, has not brought about significant increases in Negro registration in the South. In this connection it must be remembered that the Civil Rights Acts are being interpreted and applied by federal district courts located in the South and presided over by native southerners, some of whom view these Acts with revulsion. The significance of this fact should not be overlooked, for judges do not shed their prejudices when they don judicial robes. Southern federal court judges who share the sentiments of their home communities can be as obstructionist as the most volatile southern politician. Accordingly, the Civil Rights Acts, while generating meaningful results in some judicial districts, have become dead letters in others. It is not surprising, therefore, to learn that some voting rights cases which were filed in 1961 are today still pending in the federal courts.¹⁶⁴ Another interesting aspect of the problem is the interplay between certain southern federal district courts and the Fifth Circuit Court of Appeals which often appears to be like a chess game where the appellate court is continually checking the diversionary tactics of the district courts but without a checkmate.

A vivid example of the obstruction which can be wrought by a federal district court took place in Mississippi. On August 11, 1960 the Civil Rights Division requested the Registrar of Forrest County, Mississippi, to produce voting records in his possession for inspection and copying. Upon the Registrar's refusal to do so, Justice Department officials, on January 19, 1961, sought an order in the District Court for the Southern District of Mississippi for their production under Title III of the Civil Rights Act of 1960. For six months the Court failed to grant such an order. Accordingly, on July 6, 1961, the United States brought a second action in the court, this time for a temporary injunction to end discriminatory practices against Negroes in Forrest County. When this action was instituted, and after a further delay of six months, the prior proceeding was dismissed February 15, 1962, on technical grounds. Finally, after several dilatory motions and much temporizing, the motion for a temporary injunction was set down for hearing on March 1, 1962. Extensive testimony was taken, showing several acts of discrimination against Negroes in the county. But when the United States completed its case the court granted a recess over the government's objection in order to permit Mississippi and registrar Lynd to file answer to the charges made at the hearing. The govern-

161 *United States v. Wood*, 295 F.2d 772 (5th Cir. 1961).

162 Civil No. 1729, S.D. Miss., Aug. 30, 1962, 7 RACE REL. L. REP. 770 (1962).

163 See, e.g., *United States v. Matthews*, Civil No. 516, M.D. Ga., Aug. 14, 1963; *United States v. Edwards, Sheriff*, Civil No. 3413, (Jackson Div.) S.D. Miss. 1963; *United States v. City of Greenwood*, Civil No. GC638, N.D. Miss., April 1, 1963.

164 See, the list and disposition of federal litigation under 42 U.S.C. § 1971(a) and § 1971(b) in 1963 U.S. COMM. ON CIVIL RIGHTS REP. 37-50.

ment then moved in the United States Court of Appeals for the Fifth Circuit for the temporary injunction, pending an appeal from the refusal of the district court to grant the injunction on the merits.¹⁶⁵ Thus it took fifteen months from the time of the original action to get a temporary injunction that should have issued, according to *Kennedy v. Bruce*,¹⁶⁶ as a matter of course.

To obviate many of these problems which we have been discussing the Civil Rights Commission in its 1961 and 1963 reports put forth some interesting and novel proposals. To adequately evaluate these proposals, however, it is necessary to have some understanding of the general socio-political context in which they were offered. Therefore, the specific nature and scope of the problem of racial discrimination against Negroes in voting will be considered.

IV. SOUTHERN POLITICS AND NEGRO VOTING

Since the end of Reconstruction the South has been dominated by one-party rule, historically the most important and salient characteristic of southern politics. Economic cleavages, like the conflict between landowners and poor farmers, might have provided a basis for bipartisan competition in the South, but the cohesion and solidarity generated by the race question were sufficient to overcome all threats to the undiluted hegemony of the Southern Democratic Party.¹⁶⁷ The Negro's relegation to a condition of political subordination was largely an accomplished fact by 1880, following a systematic and successful effort to disfranchise him.¹⁶⁸ Indeed, white supremacy and absolute Democratic Party control were largely synonymous.

As a consequence, politics in the South has tended to resolve into rivalries among personalities and contests between intraparty factional groups. These contests are usually won or lost in primary elections, the only meaningful elections in the South. It should be noted that the primary was partly an outgrowth of the breakdown in two-party competitive politics. As Professor Key puts it, "if governors and other officials were to be popularly elected, they had to be elected, in effect, by a direct primary within the Democratic Party."¹⁶⁹ The relevance of this fact to the quantitative and qualitative aspects of Southern voting behavior should not be overlooked. Political scientists have long held to the theory that "one-partyism" is incompatible with party responsibility since it tends to drive political issues and principles into the background of a political campaign while attention is focused on personalities and factional conflict. Deprived, therefore, of the opportunity to make a meaningful choice at the ballot box in the general election, the citizen is often inclined not to vote. Students of American voting behavior have confirmed these impressions. Professor Ewing, in his study of primary elections, found voter participation much lower in primaries in the South than in the primaries of other states.¹⁷⁰ In tabulating the returns of southern state elections for 1920-46, Professor Key also found that less than thirty per cent of all eligible voters had participated

165 *United States v. Lynd*, 301 F.2d 818 (5th Cir. 1962).

166 298 F.2d 860 (5th Cir. 1962).

167 See FRANKLIN, *FROM SLAVERY TO FREEDOM* 328-38 (1960).

168 *Id.* at 328-34.

169 KEY, *POLITICS, PARTIES, AND PRESSURE GROUPS* 412 (4th ed. 1958).

170 EWING, *PRIMARY ELECTIONS IN THE SOUTH* 103 (1953).

in Democratic primaries for governor; in five states the participation level fell below twenty per cent.¹⁷¹ It should be noted that the authors are speaking of white voters, not Negroes. Key found that "in most states of the South the rate of participation by whites fell far below the rates for the total voting population in two-party states."¹⁷² He estimated that about 4,900,000 additional southern whites would have voted in their 1940 gubernatorial primaries had they shown the same level of interest of voters in the median nonsouthern state in that presidential year.¹⁷³ Professor Key also suggested that the relative isolation of the South from presidential politics — though this may not be as true today¹⁷⁴ — was one result of low voter turnout in southern elections.¹⁷⁵ Thus, a distinctive pattern of politics seems to have emerged from the subordinate relationship of the southern Negro to the southern white. Professor Key put it this way:

Low citizen-interest in voting in the South is both a cause and an effect. Absence of a presidential contest, the nature of suffrage restrictions, and Negro disfranchisement result in low turnout of voters. The habit of nonvoting grows and the electorate by custom becomes limited. The limited electorate, in turn, influences the nature of factional politics within the Democratic party by practically eliminating from the voting population substantial blocs of citizens whose political interests and objectives, if activated, would furnish the motive power for important political movements and demands.¹⁷⁶

It is one of the ironies of southern political history that in driving the Negro into political submission many a southern white has experienced a paralysis of his own political consciousness.

However helpful and useful court actions and legal sanctions might be in banishing the evils of discrimination in voting, all this would seem to indicate that the ultimate solution to the depressed condition of the American Negro in housing, employment, education, as well as in other aspects of his social existence, is to be a political one, which is why the right to vote is so critical. While it is not certain that admission of the Negro to the political system will automatically open the door to general socio-economic opportunity and first-class citizenship, it is certain that the latter will never be achieved without the former.

The Pattern of Southern Resistance

The barriers to the Negro's integration into the mainstream of American life have been coming down — slowly and painfully to be sure, but nonethe-

171 KEY, SOUTHERN POLITICS 492 (1949). KEY, *op. cit. supra* note 169 at 492.

172 *Id.* at 505.

173 *Id.* at 506.

174 See LUBELL, REVOLT OF THE MODERATES 176-206 (1956).

175 KEY, *op. cit. supra* note 169 at 506-07.

176 *Id.* at 507-08. The same point was made recently in a definitive study of American voting behavior. "The patterns of Negro and White voting must be understood in the context of the Southern struggle to define the role of the Negro citizen in a manner compatible with cultural norms that are not limited to the world of national presidential politics. But in all areas, even where this problem is most acute, we find the patterned reflection of a system of one-party politics." See CAMPBELL, CONVERSE, MILLER & STOKES, THE AMERICAN VOTER 281 (1960).

less coming down. The great symbol of those falling barriers in this century was the Supreme Court's historical school desegregation decision of ten years ago. That decision set in motion the forces which brought about the Civil Rights Acts of 1957 and 1960, and which now constitute the major stimulus behind the current civil rights bill before Congress. But the Negro's determination to secure his rights, particularly his right to vote, is being met by the equal determination in certain states and localities to retain the structure of white political supremacy. For the most part, this is being done behind the facade of states' rights and frequently in outright defiance of federal authority.

The first bricks of the South's wall of official resistance to federal initiatives in civil rights were laid in the wake of *Brown v. Board of Education*.¹⁷⁷ A climate of defiance, bound to influence southern political behavior patterns, was first created with the passage of several state resolutions of interposition and nullification.¹⁷⁸ The desegregation decision and other advances on the civil rights front were nearly all won in the courts, principally with the support and financial backing of the NAACP's Legal Defense and Educational Fund.¹⁷⁹ With the NAACP as the obvious and principal target, several state laws against barratry and champerty were redefined to bar the activities of that organization.¹⁸⁰ At least three southern states have created State Sovereignty Commissions to devise ways and means of circumventing federal directives in the civil rights field.¹⁸¹ And most recently the atmosphere of intimidation was further charged by reports that several state agencies in Alabama have been collecting information on civil rights advocates at the direction of Governor George C. Wallace.¹⁸²

It was in this context of defiance of federal law that several southern states proceeded to tighten up their voter registration laws so as to avoid the effects of the Civil Rights Acts of 1957 and 1960. Georgia, for example, rewrote her laws pertaining to registration by drafting an exceedingly difficult citizenship

¹⁷⁷ 347 U.S. 483 (1954).

¹⁷⁸ See Ga. House Resolution No. 185 (1956); Fla. Senate Concurrent Resolution No. 17-XX (1956); Ala. Act No. 42, Special Session (1956); Miss. Senate Concurrent Resolution No. 125 (1956); Va. Senate Joint Resolution No. 3 (1956); La. House Concurrent Resolution No. 10 (1956); Tenn. House Resolution No. 9 (1957); S.C. Act of Feb. 14, 1956; 1 RACE REL. L. REP. 443 (1956).

¹⁷⁹ See GREENBERG, RACE RELATIONS AND AMERICAN LAW 37-39 (1959).

¹⁸⁰ E.g., Ga. CODE ANN. § 26-4701 (Supp. 1963); MISS. CODE ANN. § 2049-01 (1942); S.C. CODE § 16-521-523 (1962); VA. CODE ANN. § 18.1-388 (1950). In proposing legislation to abolish the NAACP Georgia's Attorney General Eugene Cook said: "It has been demonstrated beyond any doubt that the NAACP is an enemy of the South, that it is the most potent enemy of our segregated system of public schools, and that its leadership represents its most effective sponsors of insidious and unconstitutional civil rights measures. The legislatures and appropriate state officials of every Southern state should unite in an all-out fight to liquidate this particular enemy of the South and constitutional government." See 1 RACE REL. L. REP. 957 (1956). In 1956 South Carolina enacted a law prohibiting the employment by the state or any school district any member of the NAACP. The NAACP was described as being "so insidious in its propaganda and the fostering of those ideas designed to produce a constant state of turmoil between the races, that membership in such an organization is wholly incompatible with the peace, tranquillity and progress that all citizens have a right to enjoy." S.C. Act No. 741 (1956), repealed by S.C. Act No. 223 (1957). As to the right of the NAACP to organize and function in a state see NAACP v. Alabama, 357 U.S. 449 (1958).

¹⁸¹ Miss. House Bill No. 880 (1956), 1 RACE REL. L. REP. 592 (1956); Ark. Act No. 83 (1957), 2 RACE REL. L. REP. 491 (1957); La. Act No. 18 (1960), 5 RACE REL. L. REP. 893 (1960).

¹⁸² N.Y. Times, Feb. 17, 1964, p. 1, col. 2.

test and adding certain new sections of such a technical nature that they were very susceptible to discriminatory application.¹⁸³ In 1961, Alabama imposed a citizenship test in addition to the literacy test previously required and then, without ordering a complete new registration, provided that any person seeking to register after January 1, 1962, would have to submit to both the literacy and the citizenship tests.¹⁸⁴ With the addition of eighteen new sections to her registration and elections code, Mississippi made it much more difficult to register¹⁸⁵ in addition to requiring electors to demonstrate proof of good moral character.¹⁸⁶ One provision requires the publication of the names and addresses of applicants for registration in local newspapers.¹⁸⁷ Within fourteen days of publication any qualified elector may then challenge the good moral character of any applicant; if such a challenge is made the applicant, after notification, is to appear on a specified date, time, and place where the registrar will hold a hearing to determine the sufficiency of the challenge.¹⁸⁸ It takes little imagination to recognize the possibilities of abuse in these provisions.

Perhaps even more repressive than discrimination by the state is the climate of fear often created by unofficial lawlessness on the part of private citizens. In a few southern counties Negroes participating in voter registration drives have been personally assaulted,¹⁸⁹ have had rifle shots fired into their homes,¹⁹⁰ and have seen their homes¹⁹¹ and churches¹⁹² burned. In October, 1961, Dr. Martin Luther King announced that "an apparent reign of terror" was being waged against Negroes in two Mississippi counties for taking part in a voter registration drive.¹⁹³ Even Southern whites have been subjected to the wrath of their neighbors for resisting state segregation policies.¹⁹⁴

The Scope of Discrimination

While tremendous gains have been made in recent decades to increase Negro registration the fact is that thousands of Negroes are disfranchised. The Civil Rights Commission reports that widespread discrimination against Negroes seeking to vote is being practiced in at least 100 counties of eight states — Alabama, Florida, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, and Tennessee¹⁹⁵ — which counties contain nearly a third of all Negroes of voting age in eleven southern states.¹⁹⁶ In his testimony before the Judiciary Committee of the Senate, Attorney General Robert Kennedy reported that there are at least 193 counties in the United States in which less than

183 GA. CODE ANN. § 34-101 to 145.

184 ALA. CODE, tit. 17, § 32(2) (Supp. 1961).

185 MISS. CODE ANN. §§ 3212.5-3305 (Supp. 1962).

186 MISS. CODE ANN. § 3212 (Supp. 1962).

187 MISS. CODE ANN. § 3212.7 (Supp. 1962).

188 MISS. CODE ANN. § 3217.02 (Supp. 1962).

189 N.Y. Times, Sept. 11, 1962, p. 20, col. 6.

190 N.Y. Times, Sept. 1, 1962, p. 20, col. 1.

191 N.Y. Times, Dec. 7, 1962, p. 26, col. 4.

192 N.Y. Times, Sept. 14, 1962, p. 1, col. 1.

193 N.Y. Times, Oct. 6, 1961, p. 32, col. 4.

194 N.Y. Times, Nov. 3, 1963, p. 82, col. 3.

195 U.S. COMM. ON CIVIL RIGHTS, 1961 VOTING REPORT 135.

196 1963 U.S. COMM. ON CIVIL RIGHTS REPORT 15.

fifteen per cent of the eligible Negroes are registered to vote.¹⁹⁷ In at least 129 counties in ten states where Negroes constitute a substantial proportion of the population, the Civil Rights Commission found that less than ten per cent of eligible Negroes are registered.¹⁹⁸ In seventeen representative black belt counties where Negroes constitute a majority of the population only about three per cent were found to be registered.¹⁹⁹

Alabama is a typical example of these conditions. Of sixty-seven counties for which voting statistics were available it was found that no Negroes were registered in two counties, under five per cent of eligible Negroes were registered in ten, under ten per cent in twelve, under twenty per cent in sixteen, and under thirty per cent in thirteen counties. Only in fourteen counties were Negroes registered in excess of thirty per cent. This contrasts with the registration of well over sixty per cent of the whites of voting age in fifty-three of the counties.²⁰⁰ The situation is even worse in Mississippi where, in 42 out of 69 counties for which statistics were available, less than 10 per cent of voting age Negroes were registered.²⁰¹

It is, of course, a little hazardous to draw a causal connection between state restrictions on voting and nonvoting among Negroes. While the incidence of nonvoting among Negroes is undoubtedly related to legal restrictions on voting, community sentiment and even religious and cultural values²⁰² may operate to inhibit Negro voting. This seems to be indicated by the fact, as the authors of *The American Voter* point out, that Negroes living in areas of high Negro density fail to vote, regardless of how stringent or lenient state laws or practices may be.²⁰³ On the other hand, the incidence of nonvoting among Negroes is less in areas where the Negro population is smaller. Yet, whether in areas of low or high Negro density nonvoting is still much more prevalent among Negroes than whites.²⁰⁴

The reasons given by the Civil Rights Commission in explaining nonvoting among Negroes are compelling, and tie in with what was said at the beginning of this article about the political effects of the Negro's alienation from society. They merit full quotation:

[T]he Negro's depressed and dependent economic condition continually operates to reinforce his subordinate political and social position, and may contribute to lack of motivation to participate in political matters. Another partial explanation may lie in the very fact that Negroes have for so long been excluded from any participation in the governmental process. Thus both habit and lack of any visible rewards to be gained by casting a vote in an election where they have no say in the selection of candidates, and the

197 *Hearings on S. 1731 and S. 1750, op. cit. supra* note 110 at 100. See also the Attorney General's testimony in *Hearings on Literacy Tests and Voter Requirements in Federal and State Elections Before the Subcommittee on Constitutional Rights of the Senate Judiciary Committee*, 87th Cong., 2nd Sess. 262 (1962).

198 U.S. COMM. ON CIVIL RIGHTS, 1961 VOTING REPORT 111.

199 *Id.* at 159.

200 *Id.* at 252-54.

201 *Id.* at 108.

202 See, Fenton and Vines, *Negro Registration in Louisiana*, 51 AMER. POL. SCI. REV. 704-13 (1957).

203 CAMPBELL, *op. cit. supra* note 176 at 279.

204 See, U.S. COMM. ON CIVIL RIGHTS, 1961 VOTING REPORT 104-11.

candidates make no effort to seek their vote or even to bring the issues before them, may lead to Negro "apathy" in many of the nonvoting counties; and this "apathy," in turn, may tend to perpetuate their exclusion from the political process. In the voting counties, on the other hand, the fact that Negroes can make their weight felt, at least to some degree, and can see some fruits of their participation in the franchise, may also be not only the effect of that participation, but a cause of it. Finally, the absence of a viable two-party system, with its vigorous competition (including registration drives) for uncommitted votes, may contribute to political passivity.²⁰⁵

The Case of Louisiana

After Reconstruction, Louisiana succeeded, like several other southern states, in disfranchising the Negro. Decades later, when the School Segregation Cases of 1954 threatened its structure of white supremacy, Louisiana officially renewed her determination "to maintain segregation of the races in all phases of our life in accordance with the customs, traditions, and laws of our State."²⁰⁶ A Joint Committee of the Louisiana Legislature was created for the specific purpose of devising methods and proposing plans for resisting the incursion of federal authority in the broad area of civil rights, including voting.²⁰⁷ A massive array of official energy was mobilized to continue denying — or at least to minimize — the Negro's potential at the ballot box, not to mention the efforts of powerful private groups, like the Association of Citizens Councils of Louisiana, to purge the names of Negro citizens from voter registration rolls.

Recognizing the critical importance of the voting registrar, the state legislature enacted several laws affecting his conduct and functions. One statute was a firm reminder to registrars that all state laws relative to voter registration and elections were to be complied with "faithfully and without reservation of conscience or mind."²⁰⁸ The state attorney general was designated the legal advisor of all voting registrars,²⁰⁹ and in the event that they become involved in federal litigation under the civil rights statutes their salaries would continue while absent from work.²¹⁰ In addition to a literacy, good character, and constitutional interpretation test already on the statute books,²¹¹ the legislature added a requirement that prospective voters "understand the duties and obligations of citizenship under a republican form of government."²¹² Moreover, the Louisiana Constitution was amended to render common-law marriage, parentage of illegitimate children, or a six-month sentence for committing a misdemeanor evidence of bad character,²¹³ in which case one could be denied the right to vote for not being of good character. A new registration form was also devised requiring some twenty-eight specific replies — such as ward and

205 U.S. COMM. ON CIVIL RIGHTS, 1961 VOTING REPORT 169.

206 House Concurrent Resolution No. 9, 1 RACE REL. L. REP. 755 (1956).

207 *Ibid.*

208 LA. REV. STAT. § 18:12(A) (Supp. 1963).

209 LA. REV. STAT. § 18:12.1.

210 LA. REV. STAT. § 18.10.

211 LA. REV. STAT. § 18:35-36 (1950).

212 LA. REV. STAT. § 18:31(2) (Supp. 1963).

213 LA. CONST., Art. VIII, § 1(c).

precinct numbers, occupation, color, sex, parish residence, together with precise information on the years, months, and even days of the voter's age, and other like matters. This form must be filled out by the applicant *without assistance*.²¹⁴ The registration laws also provide that (1) the registrar may require an applicant to produce two credible registered voters of his precinct to identify him as the person he claims to be,²¹⁵ (2) any two registered voters can challenge the registration status of other voters,²¹⁶ and (3) if challenged, the applicant must appear in person before the registrar at a specified time and place.²¹⁷ All of these provisions lend themselves to discriminatory application. The Civil Rights Commission pointed out, for example, that the misdemeanor provision of the new registration law could be used to deny a Negro the ballot for participation in a sit-in demonstration.²¹⁸

The registrar's strategic position was also revealed by the publication of a manual of procedures for registrars called, "Voter Qualification Laws in Louisiana: The Key to Victory in the Segregation Struggle."²¹⁹ Though published by the Citizens' Councils the manual was used and its distribution supported by state officials.²²⁰ In fact, in each of Louisiana's eight congressional districts, joint meetings were held between the Louisiana Joint Legislative Committee and the State Board of Registration "for the purpose of formulating plans to bring about a uniform enforcement of the voter qualification laws of the State of Louisiana."²²¹ The minutes of these meetings clearly indicated an attempt not only to resist campaigns for increased voter registration, but also to purge Negroes from current voter registration rolls.²²² At one meeting Louisiana's Attorney General, Jack P. F. Gremillion, emphasized that "the offices of the registrars of voters of the parishes are extremely important adjuncts to our battle for maintaining a segregated society in the state, and pledged the fullest cooperation of his office to their efforts to operate their offices within the strictest terms of Louisiana laws."²²³ This of course meant that as applied to Negroes all the technicalities of the voter registration laws would be scrupulously enforced.

The Civil Rights Commission found that thousands of Negroes were in

214 LA. REV. STAT. §§ 18:31(3), 18:32 (Supp. 1963).

215 LA. REV. STAT. § 18:37 (1950).

216 LA. REV. STAT. § 18:133 (1950).

217 *Ibid.*

218 U.S. COMM. ON CIVIL RIGHTS, 1961 VOTING REPORT 69.

219 See Exhibit L-5 in *Hearings Before the United States Commission on Civil Rights in New Orleans, Louisiana, Voting* 535-540 (1960-61). The following is an example of the language which characterizes the totally biased approach of this manual.

No one would think of encouraging a child of tender years to play with a loaded gun; yet many of our officials and responsible citizens condone and even approve the registration of unqualified and ignorant blocs of voters. The destruction that might be wrought by a child with a gun is, you can be sure, nothing compared to that which can be wrought by bloc voting of an ignorant electorate. Whoever encourages such a practice is not only a poor citizen, he is dangerous and an enemy to you and your family. You as a citizen must be vigilant against this danger which threatens every community in our beloved State. *Id.* at 536.

220 U.S. COMM. ON CIVIL RIGHTS, 1961 VOTING REPORT 44.

221 *Voting Hearings, op. cit. supra* note 219 at 484.

222 For minutes of each of these meetings see Exhibit J. *Id.* at 484-519.

223 *Id.* at 499.

fact disfranchised through the discriminatory application of these provisions. Registrars discriminatorily barred Negroes from the franchise by (1) absenting themselves from duty or failing to keep their offices open for business, (2) slowing down the registration process by forcing large numbers of Negroes to wait in line interminably as they sought to register or answer challenges to their registration status, (3) requiring Negroes to produce registered voters to vouch for their identification, (4) rejecting applications for registration because of minor errors like spelling mistakes, (5) failing to notify Negroes that they have not qualified to vote after filing applications for registration, and (6) submitting Negroes to difficult constitutional interpretation tests not required of white voters.²²⁴ In addition the Louisiana State Advisory Committee reported that threats of bodily harm and economic reprisal "are possibly more common than usually supposed."²²⁵

These discriminatory practices are a matter of public record. Yet it is hard to make an accurate estimate of the total number of Negroes disfranchised because of them. Nevertheless, the following figures are instructive. In its 1961 report the Louisiana State Advisory Committee noted that since 1958, following the purging tactics of white citizens' councils, Negro registration in the State decreased by 30,000.²²⁶ In St. Landry Parish registration dropped from 13,060 to 7,281; and in Webster Parish, from 1,776 to 83.²²⁷ Between December 31, 1960 and March 29, 1961 the number of registered Negro voters in St. Helena Parish dropped from 1,243 to 14 and in Pointe Coupee Parish from 2,035 to 5.²²⁸ Finally, a federal district court, in a case challenging the constitutionality of Louisiana's constitutional interpretation test, took notice of the fact that in twenty-one parishes where the interpretation test was used only 8.6 per cent of adult Negroes were registered as against 66.1 per cent of the adult white population. Also, Negro registration in these parishes dropped from 25,361 to 10,351 after the interpretation test was put into use while white registration was hardly affected.²²⁹

Literacy Tests

The literacy test is perhaps the most effective method of disfranchising the Negro today. The Attorney General has testified that "our experience shows overwhelmingly that the principal causes and method of discrimination has been the abuse of so-called literacy or interpretation tests and similar performance tests."²³⁰ Since this is a complex field touching federal-state relations at a most sensitive point let us briefly review the constitutional status of the literacy test and the nature of the current problem. It should be recalled that

224 See, U.S. COMM. ON CIVIL RIGHTS, 1961 VOTING REPORT 48-68. See also, U.S. COMMISSION ON CIVIL RIGHTS, 50 STATES REPORT, 216-21 (1961). For a detailed record of these practices see also testimony and exhibits in *Voting Hearings op. cit. supra* note 219. Recently Louisiana's Senator Allen J. Ellender made the startling admission that many of these practices are prevalent in parishes where Negroes outnumber whites. N.Y. Times, Mar. 12, 1964, p. 1, col. 4.

225 U.S. COMM. ON CIVIL RIGHTS, 50 STATES REPORT, 220 (1961).

226 *Id.* at 211.

227 *Ibid.*

228 *Id.* at 219.

229 *United States v. Louisiana*, 225 F. Supp. 353, 381 (E.D. La. 1963).

230 *Hearings on Literacy Tests and Voter Requirements, op. cit. supra* note 197 at 262.

the Supreme Court long ago held that "the privilege to vote in a State is within the jurisdiction of the State itself, to be exercised as the State may direct, and upon such terms as to it may seem proper."²³¹ The prior right of the state to establish voter qualifications includes, of course, the right to apply a literacy test.²³² But that power is limited by the fourteenth²³³ and the fifteenth²³⁴ amendments. Thus, the infamous "grandfather clause" of the Louisiana Constitution was struck down because it had the effect of disfranchising illiterate Negroes, but not illiterate whites.²³⁵

Today nineteen states administer some form of literacy test as a prerequisite for voting. In five of these states the test is quite simple in that the elector must merely demonstrate that he can read a provision of the state or federal constitution and write his name,²³⁶ while several other states require the elector to read *and write* a section of the state or federal constitution.²³⁷ New York and Oregon require the elector to read and write *in English*.²³⁸ Wyoming and Connecticut require him to read in English a section of the state constitution,²³⁹ while in the State of Washington he is required to read *and speak* English.²⁴⁰ In Virginia, the elector must file an application for registration "in his own handwriting, without aid, suggestions, or memorandum."²⁴¹

More troublesome are the literacy tests of Georgia, Louisiana, and Mississippi. In Georgia, the elector is required to read "intelligibly" and write "legibly" a section of the state or federal constitution which a board of registrars submits to him. If the applicant is unable to read or write because of a physical disability the section is read to him, whereupon he must give a "reasonable interpretation" of the provision.²⁴² If, however, the elector does not take the literacy test, he has the option of qualifying to vote by meeting a good character test and showing that he understands the duties and obligations of citizenship under a republican form of government, in which case he must answer correctly at least twenty or thirty questions listed in the statutes²⁴³ and orally propounded to him by the registrar.²⁴⁴ Louisiana requires an elector to be able to read and write in English or in his native language, to be of good character, and to understand, as in Georgia, the obligations of citizenship.²⁴⁵ Mississippi requires a similar citizenship test and good moral character, but the elector must also be able to read and write any section of the state constitution and give a "reasonable interpretation" thereof.²⁴⁶

231 Pope v. Williams, 193 U.S. 621, 632 (1903).

232 Williams v. Mississippi, 170 U.S. 213 (1898).

233 See Nixon v. Herndon and Nixon v. Condon, 286 U.S. 73 (1932).

234 Lane v. Wilson, 307 U.S. 268 (1939).

235 Guinn v. United States, 238 U.S. 347 (1915).

236 ARIZ. REV. STAT. § 16-101 (1956); CALIF. CONST. ART. II, § 1; DEL. CODE ANN. Tit. 15, § 1701 (1953); ME. REV. STAT., c. 3, § 2 (1954); MASS. GEN. L. ANN., c. 51, § 1 (1945).

237 ALA. CODE, Tit. 17, § 32, (1959); N.H. REV. STAT. ANN. 55: 10-12 (1955); N.C. GEN. STAT. § 163-28 (1952); OKLA. STAT. ANN., Tit. 26, § 61 (1955); S.C. CODE § 23-62 (1962).

238 N.Y. ELECTION LAW § 150 (1949); ORE. REV. STAT. § 247.131 (1963).

239 WYO. STAT. ANN. § 22-6 (1957); CONN. GEN. STAT. ANN. § 9-12 (1960).

240 WASH. REV. CODE ANN. § 29.07.070 (1963).

241 VA. CODE § 24-68 (1950).

242 GA. CODE ANN. § 34-117 (1962).

243 GA. CODE ANN. § 34-119 (1962).

244 GA. CODE ANN. § 34-118 (1962).

245 LA. REV. STAT., Tit. 18, § 31 (1951).

246 MISS. CODE ANN. § 3213 (Supp. 1962).

Objective literacy tests, like the one required by North Carolina, seem beyond constitutional doubt. Not long ago a citizen of North Carolina, a Negro, refused to take that state's literacy test on the ground that it contravened the fifteenth amendment. In sustaining the test the Supreme Court said:

We do not suggest that any standards which a State desires to adopt may be required of voters. But there is wide scope for exercise of its jurisdiction. Residence requirements, age, previous criminal record are obvious examples indicating factors which a State may take into consideration in determining the qualifications of voters. The ability to read and write likewise has some relation to standards designed to promote intelligent use of the ballot. Literacy and illiteracy are neutral on race, creed, color, and sex, as reports around the world show. Literacy and intelligence are obviously not synonymous. Illiterate people may be intelligent voters. Yet in our society where newspapers, periodicals, books and other printed matter canvass and debate campaign issues, a State might conclude that only those who are literate should exercise the franchise. It was said last century in Massachusetts that a literacy test was designed to insure an "independent and intelligent" exercise of the right of suffrage. North Carolina agrees. We do not sit in judgment on the wisdom of that policy. We cannot say, however, that it is not an allowable one measured by constitutional standards.²⁴⁷ (citations omitted)

New York's literacy requirement that a citizen be literate in English was also recently questioned. A Puerto Rican citizen claimed that his denial of the right to vote, despite his obvious literacy in the Spanish language, violated the Fourteenth and Fifteenth Amendments. Both claims were rejected by the New York Court of Appeals.²⁴⁸ And later, a three-judge federal district court held that the New York law contravened neither the federal constitution nor the Civil Rights Act of 1957 and 1960, saying:

The statute is not an unreasonable exercise of the powers of the state to provide requirements for exercising the elective franchise. It is not unreasonable to expect a voter not only to be conversant with the issues presented for determination in choosing between candidates for elections, but also to understand the language used in connection with voting. For example, there are printed in English on the ballot synopses of proposed constitutional amendments, titles of the offices to be filled and directives as to the use of the proper ballot or voting machines. Finally what is more proper than that the voter be literate in the language used to conduct the business of government in his state.²⁴⁹

Of course, a literacy requirement which is *prima facie* fair and reasonable might be unconstitutional in operation if administered discriminatorily.²⁵⁰ Indeed, the literacy tests of Georgia, Louisiana, Mississippi, and South Carolina

²⁴⁷ *Lassiter v. Northampton County Board of Elections*, 360 U.S. 45, 51-53 (1959). Two years later the Supreme Court of North Carolina held that "a test of literacy that requires an applicant for registration to write a section or sections of the Constitution from the reading and dictation of another, however fairly and clearly the same might be read and dictated, is unreasonable and beyond the clear intent of the statute." *Bazemore v. Bertie County Board of Electors*, 254 N.C. 398, 119 S.E. 2d 637, 642 (1961).

²⁴⁸ *Camacho v. Doe*, 194 N.Y.S.2d 33. (1959).

²⁴⁹ *Camacho v. Rogers*, 199 F. Supp. 155, 159 (S.D. N.Y. 1961).

²⁵⁰ *Cf. Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

were designed to bar Negroes from the polls,²⁵¹ and the constitutional status of these laws is therefore in jeopardy. It should be noted, however, that the literacy test was not extensively employed in the southern states prior to the 1950's when Negroes were effectively excluded from participation in primary elections. It is only since *Smith v. Allwright*²⁵² that the literacy test has been applied to disfranchise the Negro.²⁵³

Shortly after the white primary was nullified, Alabama ratified the so-called Boswell Amendment which granted the franchise only to persons who could "understand and explain any article of the constitution of the United States in the English language." The court looked behind the legislation to take judicial notice of the fact that the amendment was designed to circumvent the *Allwright* case and to restrict Negro registration. In *Davis v. Schnell*²⁵⁴ the amendment was struck down as unconstitutional on its face.

Schnell seemed at variance with an earlier case which held Louisiana's "reasonable interpretation test" consistent with federal constitutional standards.²⁵⁵ But in *Darby v. Daniel*,²⁵⁶ decided in 1955, the "reasonable interpretation" test of Mississippi was upheld by a three-judge federal court against federal constitutional objections. *Darby* was apparently distinguished from *Schnell* since Mississippi provided a structure of administrative review in the event of a denial of the right to vote, whereas Alabama delegated complete and arbitrary power to the registrar to determine for himself whether a person has met the test. Moreover, the court in *Darby* found no proof of the law's discriminatory application and also declined, unlike the court in *Schnell*, to inquire into legislative motives behind the statute.

Just recently, however, the "reasonable interpretation" test was again reviewed by a three-judge federal district court in an important suit brought by the United States under 42 U.S.C. 1971 against Louisiana; the test was challenged as violative of the Civil Rights Act and the Constitution. Not only did the court find overwhelming evidence of discrimination against Negroes by registrars, but also found such to be "a matter of state policy in a pattern based on the regular, consistent, predictable unequal application of the test."²⁵⁷ This, said the court, was "the inescapable effect of a subjective requirement such as an understanding or interpretation test barren of standards and safeguards, the administration of which rests in the uncontrolled discretion of a registrar."²⁵⁸ Indeed, the "ineradicable vice vitiating any relation [of the test] to a legitimate governmental objective is the raw power vested in registrar."²⁵⁹ In strong and unambiguous language the court struck down the interpretation test as invalid *per se* under the fourteenth and fifteenth amendments:

We hold: this wall, built to bar Negroes from access to the franchise, must come down. The understanding clause or interpre-

251 KEY, *op. cit. supra* note 169 at 557-59.

252 321 U.S. 649 (1944).

253 KEY, *op. cit. supra* note 169 at 555.

254 81 F. Supp. 872 (S.D. Ala.), *aff'd per curiam*, 336 U.S. 933 (1949).

255 *Trudeau v. Barnes*, 65 F.2d 563 (5th Cir. 1933), *cert. denied*, 290 U.S. 659 (1933).

256 168 F. Supp. 170 (S.D. Miss. 1958).

257 *United States v. State of Louisiana*, 225 F. Supp. 353, 381 (E.D. La. 1963).

258 *Ibid.*

259 *Id.* at 386.

tation test is *not* a literacy requirement. It has no rational relation to measuring the ability of an elector to read and write. It is a test of an elector's ability to interpret the Louisiana and United States Constitutions. Considering this law in its historical setting and considering too the actual operation and inescapable effect of the law, it is evident that the test is a sophisticated scheme to disfranchise Negroes. The test is unconstitutional as written and as administered.²⁶⁰

For practical reasons, however, the court did not order a new registration. Tailoring the remedy to necessity and to a fair respect for established state procedures the court specifically enjoined the use of the state's citizenship test in twenty-one parishes where the interpretation test resulted in the disfranchisement of many Negroes, until such time that the state decides to order a general re-registration so that all citizens might then register on an equal basis.²⁶¹ The court also enjoined the use of the citizenship test in the registration of any person who was of voting age and had the required residence in his parish before August 3, 1962.²⁶² That was the date the objective citizenship test — to be discussed below — was put into operation.²⁶³ It should be noted that the court did not decide whether the citizenship test was constitutional. In a strong dissent Judge West noted that it was grossly improper for the court to enjoin a valid state voter qualification law without setting it aside for constitutional reasons.²⁶⁴

Freezing the Registration Rolls

Even the impartial administration of these tighter registration laws and more difficult literacy tests will have the effect of minimizing Negro registration, at least over the short run, if the southern states do not order new registrations. Failure to do so probably constitutes discrimination since white voters already registered would not be required to meet the demands of recently enacted voter qualification laws now required of Negroes as well as whites. Thus, the registration rolls freeze the results of past discrimination. A federal district court defined freezing as that which "results when there have been past discriminatory practices, these practices are discontinued, but some action is taken which is designed to retain the status quo, the position of advantage which one class has already obtained over the other."²⁶⁵ For instance, a Mississippi sheriff responsible for collecting the poll tax instituted a new policy which required individuals paying their poll tax for the first time to see him personally. On review, the Court of Appeals for the Fifth Circuit held that the discriminatory purpose and effect of the new policy was obvious since it would affect almost all Negroes, because of prior discrimination, but only a small percentage of white people.²⁶⁶ This principle was accepted by another court in *United States v. Atkins*,²⁶⁷ but for practical reasons no re-registration was ordered.

260 *Id.* at 356.

261 *Id.* at 397.

262 *Ibid.*

263 LA. REV. STAT. 18:191 (Supp. 1963).

264 *United States v. State of Louisiana*, 225 F. Supp. 353, 398 (E.D. La. 1963).

265 *United States v. Dogan*, 314 F.2d 767 (5th Cir. 1963).

266 *United States v. Atkins*, 323 F.2d 733, 743 (5th Cir. 1963).

267 323 F.2d 733 (5th Cir. 1963).

The constitutionality of the freezing practice was also raised in *United States v. Louisiana*.²⁶⁸ There, as we have said, the interpretation test was struck down. Yet a majority of registered Louisiana voters never took the test since it was not applied before 1954. Not only that, but thousands of Negroes were denied registration between 1954 and 1963 when the interpretation test was used discriminatorily. Then, anticipating an adverse ruling on the interpretation test the 1962 Louisiana legislature provided that the State Board of Registrars draft an objective test of citizenship under a republican form of government. Prior to 1962 no objective test had been used. Though the new test was considerably more difficult than the "tests" administered to white applicants in the past and though it "will have the effect of perpetuating the differences created by the discriminatory practices of the past,"²⁶⁹ the court reserved judgment on the test's constitutionality, although enjoining its application in twenty-one parishes, where the now unconstitutional interpretation test was employed, until the state orders a new registration in those parishes.²⁷⁰

The Supreme Court has not yet had the opportunity to decide whether the freezing practice violates constitutional standards and, if so, whether a state *must* re-register every eligible voter in accordance with equal standards. The issue was presented, but not decided, in *Lassiter v. Northampton County Board of Elections*²⁷¹ where the appellant pointed out that registered white voters who qualified to vote without a literacy test under North Carolina's "grandfather clause" prior to December 1, 1908 — after which the clause was not used — rendered the literacy test administered to her violative of the fifteenth amendment. Since this question was not decided by the North Carolina Supreme Court in the case below, the Supreme Court did not reach it, but went on to point out that *Lassiter*, in upholding North Carolina's literacy test, should not be construed to bar the appellant from presenting the issue at some future time in a proper proceeding.

V. THE CIVIL RIGHTS BILL OF 1963-64

It was against the backdrop of these many socio-legal and political factors, together with specific findings regarding the extent of racial discrimination in elections, that led the Civil Rights Commission to conclude as follows in its most recent report:

The conclusion is inevitable that present legal remedies for voter discrimination are inadequate. In many instances, litigation has not secured to qualified American citizens the right to vote. Further, the narrowly drawn commands of voting decrees often are evaded. In other instances, private intimidation — both before and after registration — frustrates the ultimate exercise of the right. In seven States, the right to vote — the abridgement of which is clearly forbidden by the 15th Amendment to the Constitution of the United States — is still denied to many citizens solely because of their race.²⁷²

268 225 F. Supp. 353 (E.D. La. 1963).

269 *Id.* at 393.

270 *Id.* at 397.

271 360 U.S. 45 (1959).

272 1963 U.S. COMM. ON CIVIL RIGHTS REP. 26.

Disappointment with the results of the Civil Rights Act of 1957 and 1960 moved the Commission to recommend in an earlier report that Congress enact legislation (1) to forbid the use of *any* literacy test, (2) to specifically prohibit all discriminatory practices which interfere with the right to vote, and (3) to make a sixth-grade education presumptive evidence of literacy if such a test is administered.²⁷³ The most radical of these recommendations was the suggestion to eliminate all literacy tests. But the proposals were even more restrictive of state power since they provided that no state voter qualifications should be imposed except those of age, residence, legal confinement, or conviction of a felony.²⁷⁴ Commissioners Robert G. Storey and Robert S. Rankin dissented on the ground that the balance of the federal system would be upset if these restrictions were imposed upon the states.²⁷⁵ "Proposals to alter longstanding Federal-State relationships such as that incorporated in the Federal Constitution, declaring that the qualifications of electors shall be left to the several States," said Storey, "should not be made unless there is no alternative method to correct an existing evil."²⁷⁶

But it is interesting to note that when the Commission submitted the recommendation for a second time, in 1963, Commissioners Storey and Rankin concurred, and said:

Now, 2 more years have passed since the most recent of these acts. The evil of arbitrary disfranchisement has not diminished materially. The responsibility which must march hand-in-hand with State rights no less than with civil rights has, as to the right to vote, often been ignored. Progress toward achieving equal voting is virtually at a standstill in many localities. For these reasons we have concluded sadly, but with conviction, that without drastic change in the means used to secure suffrage for many of our citizens, disfranchisement will continue to be handed down from father to son.²⁷⁷

The drastic changes referred to were recommendations that Congress provide for the appointment of temporary voting registrars in areas where ten or more individuals swear under oath that they have unsuccessfully attempted to register, but believe they were denied the right to register because of race, or color and that Congress, as a last resort, invoke the punitive section of the fourteenth amendment by reducing the representation of states continuing to deny the franchise to citizens because of their race.²⁷⁸ As for voter qualification laws, the Commission toned down its 1961 recommendation by indicating that states might be allowed to exclude citizens from voting if they have not achieved a sixth-grade education or if they have been adjudged mentally incompetent.²⁷⁹

The Congressional Response

It should be recalled here that on February 28, 1963, President Kennedy

273 U.S. COMM. ON CIVIL RIGHTS, 1961 VOTING REPORT 139-41.

274 *Id.* at 139.

275 *Id.* at 139-41.

276 *Id.* at 140.

277 1963 U.S. COMM. ON CIVIL RIGHTS REP. 30.

278 *Id.* at 28-29.

279 *Id.* at 28.

urged Congress to write additional guarantees into federal laws dealing with the protection of the right to vote.²⁸⁰ His proposals paralleled several recommendations of the Civil Rights Commission. Three bills to forbid the discriminatory application of literacy tests had been previously introduced into the second session of the 87th Congress,²⁸¹ after which several days of hearings were held,²⁸² but no action on the bills was taken. Then, following weeks of mass demonstrations against racial discrimination in the spring of 1963, the President finally incorporated his February 28th proposals into an omnibus civil rights bill which he submitted to Congress.²⁸³ Personally convinced of the moral necessity of such legislation and fearing that further congressional inaction in the area of civil rights would retard "our Nation's economic and social progress and weaken the respect with which the rest of the world regards us,"²⁸⁴ the President implored Congress to remain in session until its final passage. Because of congressional politics and the untimely death of President Kennedy the Civil Rights Act of 1963 never materialized. But President Johnson has been no less insistent than his predecessor in pressing for the earliest possible enactment of these civil rights proposals.²⁸⁵

With the vigorous support of President Johnson the omnibus civil rights bill, known as H.R. 7152,²⁸⁶ was recently passed in the House of Representatives by a substantial margin,²⁸⁷ and as this is written is subject to a southern filibuster in the U. S. Senate. In view of the fact that Title I, which deals with voting rights and includes several presidential and commission recommendations discussed above, will probably survive the legislative skirmish intact, the provisions of the voting title and some of the problems they raise will be briefly considered.

Keyed to eliminating many of the discriminatory practices discussed in this paper, Title I amends 42 U.S.C. § 1971 (a) to require any person acting under color of law to apply *uniform* standards, practices, or procedures in registering individuals to vote; and specifically forbids any such person (1) to deny an elector his right to vote for errors or omissions on *any* registration application "not material in determining whether such individual is qualified under State law to vote," or (2) to employ *any* literacy test as a qualification for voting *unless* the test is given in writing (except when the applicant requests and State law authorizes an oral test) and a copy of the test and the answers thereto are

280 109 CONG. REC. 3081-82 (daily ed. Feb. 28, 1963).

281 S. 480; S. 2750; S. 2979, 87th Cong., 2nd Sess. (1962).

282 See *Hearings on Literacy Tests and Voter Requirements* 161 (1962).

283 See H.R. Doc. No. 124, 88th Cong., 1st Sess. 2,14-16 (1963).

284 *Id.* at 3.

285 In his first appearance before a joint session of Congress President Johnson emphasized that:

[N]o memorial oration or eulogy could more eloquently honor President Kennedy's memory than the earliest passage of the civil rights bill for which he fought so long. We have talked long enough in this country about equal rights. We have talked for 100 years or more. It is time now to write the next chapter — and to write it in the books of law." He continued: "I urge you again, as I did in 1957, and again in 1960, to enact a civil rights law so that we can move forward to eliminate every trace of discrimination and oppression that is based upon race or color." 109 CONG. REC. 21734 (daily ed. Nov. 17, 1963).

286 See H.R. REP. No. 914, 88th Cong., 1st Sess. 1-16 (1963).

287 110 CONG. REC. 2708-09 (daily ed., Feb. 10, 1964).

given to the applicant. Title I amends 42 U.S.C. 1971 (c) to create a rebuttable presumption that a person who possesses a sixth-grade education is sufficiently literate to vote in Federal elections. These provisions would apply only to Federal elections. To avert the court delays which often frustrated the work of the Civil Rights Division, the Attorney General was empowered to request a three-judge federal district court to hear a voting case. Appeals from such courts would, of course, lie directly to the Supreme Court. But if the Attorney General does not file a request for a three-judge court the Chief Judge of the district must designate a judge in the district to hear the case which would have to be determined at the "earliest practicable date."²⁸⁸ Finally, Title VIII requires the Census Bureau to collect registration statistics based on race, color, and national origin relative to primary and general elections to the House of Representatives since 1960 in areas designated by the Civil Rights Commission. Beginning with the 1970 census those statistics would be collected on a nationwide basis.²⁸⁹ It appears to have been the intention of the House to use this provision as a basis for reducing, in accordance with Section 2 of the fourteenth amendment, the representation of those states which continue to deny citizens their right to vote.²⁹⁰ It is interesting to note that the temporary voting registrar plan, supported by the Administration²⁹¹ and recommended by the Civil Rights Commission,²⁹² was not included in the final House version of the bill.

Federal Power over Elections

However bold these voting rights provisions, still H.R. 7152 is far from exhausting the plenitude of congressional power over elections. Whatever doubts may exist about the power of Congress over state elections, that power with respect to federal elections seems nearly complete if not unlimited. There is no doubt, for example, that Art. 1, Sec. 4 grants Congress the authority to provide for the appointment of voting registrars, independent of the courts and the judicial process, to supervise state administration of federal elections. If Congress wishes it might even establish separate federal election machinery in the states to conduct the election of U.S. Senators and Representatives. Indeed, it has been suggested that such a plan would not only minimize federal-state conflict in this sensitive area, but also accelerate the process of achieving universal Negro suffrage in America.²⁹³ The solution of H.R. 7152 is really a conservative one, for Congress continues to rely on the courts and the police to insure the right to vote instead of establishing needed administrative machinery to undertake this task.

Perhaps the most drastic proposal to be advanced in getting at the problem of discrimination in voting was the Civil Rights Commission's suggestion that the punitive section of the fourteenth amendment be invoked, though only as

288 See H.R. REP. NO. 914 *supra* note 286 at 1-2.

289 *Id.* at 15.

290 See 110 CONG. REC. 1824 (daily ed., Feb. 4, 1964) (remarks of Congressman Meader).

291 See testimony of Attorney General Robert Kennedy, *Hearings Before Subcommittee No. 5 of the House Judiciary Committee*, 88th Cong., 1st Sess. ser. No. 4, pt. II at 1379 (1963).

292 1963 U.S. COMM. ON CIVIL RIGHTS REP. 28-29.

293 De Grazia, *A New Way Towards Equal Suffrage*, 34 N.Y.U.L. REV. 716 (1959).

a last resort.²⁹⁴ This appears to be the veiled threat behind Title VIII of H.R. 7152 requiring the Census Bureau to collect voter registration statistics based on race. Considering the many other options open to Congress this appears to be a politically unwise and ineffective means of attacking the problem. The Civil Rights Commission specifically recommended that this alternative not be resorted to until after its registrar plan had at least been tried.²⁹⁵ It should, of course, be pointed out that southern representation in Congress could not be reduced until after the 1970 census. Perhaps Congress feels that the mere threat of such a reduction in representation might induce southern states to put their houses in order before that time. But there is no assurance of this. At any rate, reducing Mississippi's congressional representation is not going to get a single Mississippi Negro to the ballot box.

Another limiting feature of the bill is that it applies only to federal elections. Here again Congress failed to abide by the recommendations of the Civil Rights Commission. So long as the electoral process in the states remains indivisible H.R. 7152 will affect state as well as federal elections. But if a state should decide to administer federal elections separate from its own elections the latter would not be affected by the provisions of this bill. And it is not certain that some states would not go through the expense and effort to accomplish this. As Congressman Robert W. Kastenmeier pointed out, "certain States of the Union have shown a great willingness to incur considerable expense and inconvenience, even to closing an entire public school system, to avoid granting equality to their Negro citizens."²⁹⁶ Certainly there is sufficient power in the federal government to regulate state elections so as to eliminate discrimination at the polls.

In this connection it should be pointed out that one of the constitutional objections to these restrictions even as applied to federal elections is that they conflict with the constitutional right of the state to set voter qualifications in accordance with the seventeenth amendment and Section 2 of Article I. The feature most objected to makes a sixth-grade education a rebuttable presumption of literacy. *Lassiter v. Northampton County Board of Election Commissioners*²⁹⁷ is continually invoked by states' rights pleaders to support their position. There, however, the Court merely upheld a state literacy requirement; and in so doing the Court did not suggest that the power of a state to set such a test was unlimited. Even a state's acknowledged right to set the boundaries of its political subdivisions is limited by the fifteenth amendment.²⁹⁸ Indeed *Lassiter* emphasized that "while the right of suffrage is established and guaranteed by the Constitution it is subject to the imposition of State standards which are not discriminatory and which do not contravene any restriction that Congress acting pursuant to its constitutional powers, has imposed."²⁹⁹ (Emphasis added.) In other words *Lassiter* does not bar positive congressional action under the fifteenth amendment which reasonably seeks to eliminate the dis-

294 1963 U.S. COMM. ON CIVIL RIGHTS REP. 29.

295 *Ibid.*

296 H.R. REP. NO. 914 *supra* note 286 at 40.

297 360 U.S. 45 (1959).

298 *Gomillion v. Lightfoot*, 364 U.S. 339 (1960).

299 360 U.S. 45, 51 (1959).

crimination proscribed by the amendment. A large body of evidence testifies to the fact that literacy tests have been used arbitrarily to deny Negroes their right to vote. Federal prescription, therefore, of criteria and practices by which literacy can be objectively determined, so as to foreclose any possibility of discrimination, seems eminently reasonable and appropriate. It would also seem to be a reasonable presumption that a person with a sixth-grade education is sufficiently literate at least for the purpose of voting.

Arbitrary denials of the right to vote also violate the Equal Protection and Due Process Clauses of the fourteenth amendment,³⁰⁰ provisions equally enforceable by appropriate legislation. Erwin N. Griswold, Dean of the Harvard Law School and member of the Civil Rights Commission, in a statement before the Senate Judiciary Committee in 1962, even pointed to the relevancy of the thirteenth amendment in support of federal limitations on the administration of state voter qualifications, especially literacy tests since, as he put it, "discrimination which exists on the ground of race in a number of states with respect to voting and other matters is a direct descendant of slavery as an institution in the United States." Because Negro disfranchisement is a vestige of slavery, Griswold holds, Congress might be justified in using this Amendment as additional support for doing away with such vestiges.³⁰¹

Since this bill is designed to reach federal elections still other constitutional provisions are applicable. In *Twining v. New Jersey*³⁰² the Supreme Court indicated that the right to vote for federal officials is a privilege of national citizenship secured by the fourteenth amendment. The privileges and immunities clause standing alone would therefore seem to constitute the necessary support for remedial legislation against the arbitrary denial of the right to vote in federal elections. Finally, Congress indisputably has the *implied* power to protect the integrity of federal elections and accordingly may take whatever necessary and proper steps it deems expedient to insure the purity of the federal election ballot.³⁰³

Congressional power over federal elections might also be extended by breathing meaning and life into certain dormant constitutional provisions. Take, for example, the Article I clause relating to the times, places, and manner of holding elections. The term "manner" might well be interpreted to include any aspect of the registration process, including the substance and application of literacy tests. There is no reason to bar a broad construction of this provision. The fact that no Supreme Court decision currently supports that construction is certainly no bar to congressional action under Article I, Section 4.

A constitutional provision seldom discussed in connection with federal power over state elections is Section 3 of Article IV, which declares, "The United States shall guarantee to every State in this Union a Republican Form of Government."³⁰⁴ Once again, because congressional power under the Guarantee

300 *Davis v. Schnell*, 81 F. Supp. 872 (S.D. Ala.) *aff'd per curiam*, 366 U.S. 933 (1949).

301 *Hearings on Literacy Tests and Voter Requirements*, *supra* note 197 at 137.

302 211 U.S. 78 (1908).

303 *Burroughs and Cannon v. United States*, 290 U.S. 534 (1934).

304 U.S. CONST. art. IV, sec. 3.

Clause has never been exercised is no reason why that provision should not be applied to distinctive problems of representative government that confront the states in the 1960's. No state government is truly republican which prevents large blocs of qualified citizens from participating in the election of state representatives. Of course, any state can easily argue that the interests of all its citizens are considered by its government even though many of these citizens are not permitted to vote and do not have representation proportionate to their numbers. But this concept is kindred to the representation that benevolent dictators are prone to give their subjects. One of the grievances of the colonists before the American Revolution was that they were not *actually* represented in Parliament; they were wholly unwilling to accept the Crown theory of *virtual* representation. To them this was equivalent to no representation. Professor William Crosskey of the University of Chicago Law School has suggested that "since 'Republican Government' . . . is unsafe (if indeed it can be said to exist) when the franchise is not enjoyed widely among the mass of qualified men, Congress could also, very reasonably, pass laws to assure a broad enjoyment of the right of voting . . . throughout the forty-eight states."³⁰⁵

In failing to make the provisions of H.R. 7152 applicable to the states Congress was apparently making a political judgment by perhaps not wishing to exacerbate increasing federal-state tensions, especially in an election year. By investing the Attorney General with power to request three-judge federal district courts and by requiring all federal courts to expedite voting cases the way may be cleared for more effective implementation of the right to vote. Obviously legal sanctions are not *the* solution to the problem of nonvoting among Negroes. Negro motivation and determination together with private educational endeavor are also required. But law has a necessary and constructive role to play. Indeed, when necessary law must come to the aid of those illegally deprived of their constitutional rights. But Congress does not seem ready to employ all, or even the most effective, weapons in its arsenal of constitutional warfare. Yet given the quiescence of Congress on this issue for so many decades, the Civil Rights Acts of 1957, 1960, and 1964 are remarkable achievements. They point out dramatically, as Commissioners Storey and Rankin note in the 1963 Civil Rights Report, that "States rights carry with them State obligations to all its citizens."³⁰⁶

305 1 CROSSKEY, *POLITICS AND THE CONSTITUTION* 523 (1953).

306 1963 CIVIL RIGHTS COMMISSION 31.